IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

*Petitioner,*

*v.*

HONORABLE RICHARD KNEIP, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF FOR THE TRIBE

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
*Attorney for the Petitioner.*

Washington, D.C. • THIEL PRESS • (202) 638-4521

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-114) is reported at 375 F. Supp. 1065. The mandate of the court of appeals was stayed pending this Court's final disposition of the case. (App. 32.)

## JURISDICTION

The judgment of the court of appeals (Pet. App. 61) was entered on July 16, 1975. The petition was filed on October 11, 1975. This Court granted the petition on May 24, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Where Congress by three statutes enacted in 1904, 1907 and 1910 (1) unilaterally, and without the consent of the Tribe, opened unallotted and unreserved tribal land on three-fourths of the Rosebud Indian Reservation for sale to settlers with the proceeds of the sales to be expended for the benefit of the Indians "only as received", and (2) at the same time affirmatively declared that the United States was not purchasing the land and was not guaranteeing to find purchasers, but was acting only as a trustee in the disposition of the lands:

> Whether the three statutes terminated three-fourths of the Rosebud Indian Reservation, or whether that area continued to be "Indian country", defined as "all land within the limits of any Indian reservation * * * " in 18 U.S.C. 1151?

## STATUTES INVOLVED

The statutes involved are the Acts of April 23, 1904, c. 1484, 33 Stat. 254; March 2, 1907, c. 2536, 34 Stat. 1230; May 30, 1910, c. 260, 36 Stat. 448, and June 25, 1948, c. 645, 62 Stat. 757, as amended (18 U.S.C. 1151), respectively. The full text of the statutes are set out at pages 1a-13a *infra.*



## STATEMENT

In each of three statutes, adopted in 1904, 1907 and 1910, the United States, without the consent of the Tribe, unilaterally opened unallotted and unreserved tribal land on the Rosebud Indian reservation to settlement, with the proceeds of sales to settlers to be credited to the Tribe "only as received". In the last section of each statute, the United States affirmatively declared that it was not purchasing the land, and that it was not guaranteeing to find purchasers. (See pp. 41-42 *infra.*) Without reference to this language the court of appeals assumed the three statutes to be outright cessions to the United States, that extinguished the Indian title, placed the land in the public domain and terminated about three-fourths of the reservation. The Tribe's position is that the three statutes did no more than open the land to settlement; that the Tribe did not sell and the United States did not buy the land; that none of the land was made part of the public domain; and that the three statutes did not shrink the reservation bounds or affect the reservation status.

The Rosebud Sioux Tribe of South Dakota is an important Indian tribe with a current enrollment in excess of 9400 members and an on-reservation population of 7181 Indians.[1] The Rosebud Sioux are Indians of the Sioux Nation. The treaty relationship between the United States and the Sioux Nation dates from 1815.[2] In 1851, the United States by the famous Treaty of Fort Laramie recognized the Sioux Nation as the owner of a

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[1] *Federal and State Indian Reservations*, an *EDA Handbook*, p. 339 (GPO 1971)

[2] Treaties of July 19, 1815, 7 Stat. 125; June 22, 1825, 7 Stat. 250; July 5, 1825, 7 Stat. 252; July 16, 1825, 7 Stat. 257.

defined domain in what later became North Dakota, South Dakota, Nebraska, Montana and Wyoming.[3] The Rosebud Reservation finds its origin in that part of the Fort Laramie Sioux country located west of the Missouri River in South Dakota that was "set apart for the absolute and undisturbed use and occupation" of the Sioux, as the Great Sioux Reservation, by Article 2 of the Treaty of April 29, 1868, 15 Stat. 635. Article 12 of the 1868 Treaty promised that no cession of any part of the reservation would be valid without the written consent of three-fourths of the male adults.[4]

In 1877, the United States, without the consent of the Sioux, took about 7.5 million acres embracing the Black Hills portion of the Great Sioux Reservation, and placed that acreage in the public domain. Act of February 28, 1877, 19 Stat. 254; *Sioux Tribe v. United States,* 205 Ct. Cl. 148, 155, 500 F.2d 458, 460 (1974); *Sioux Tribe v. United States,* 97 Ct. Cl. 613, 619-627, 655-656 (1942), certiorari denied 318 U.S. 789. Under an 1889 Act, with the written consent of the Sioux, Congress expressly "restored to the public domain" about one-half of the diminished Great Sioux Reservation (sec. 21) and, from the other half, carved out six reservations (secs. 1-6). One of the six was Rosebud, "set apart for a permanent reservation" (sec. 2). Act of March 2, 1889, c. 405, 25 Stat. 888. The Rosebud Reservation embraces what later were organized as three full counties (Todd,

[3]Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749. *Sioux Tribe v. United States,* 205 Ct. Cl. 148, 155, 500 F.2d 458, 460 (1974).

[4]"ARTICLE 12. No treaty for the cession of any portion or part of the reservation, herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in same;* * *."



Mellette and Tripp), a major part of a fourth (Gregory) and a small corner of a fifth (Lyman–hereinafter treated as part of Gregory). (See Map, p. 17a, *infra.*)

The 1889 Act (secs. 8-11) authorized allotments on each of the six Sioux reservations with the consent of the majority of the male adult reservation Indians (sec. 9).[5] Shortly after the Sioux were established on their separate reservations, the allotment process was initiated and went forward on a continuing basis. By 1901, 4508 allotments had been made on Rosebud alone. As of March 1903, 4699 allotments had been made on Rosebud. The population that year was reported at 4972. (App. 524, 530, CIA, 1901, p. 372; CIA, 1903, pp. 318, 522.)

Section 12 of the 1889 Act specified that after allotments have been made to all the Indians on any of the separate reservations, the Secretary was authorized to negotiate "* * *in conformity with the treaty or statute under which said reservation is held* * *, [for the purchase of] such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,* * *." (For the full text of section 12, see p. 15a, *infra.*) This meant that any sale of tribal land would be invalid without the written consent of at least three-fourths of the male adults, as required by Article 12 of the 1868 Treaty. (See p. 4, fn. 4, *supra.*)

The Secretary took no action under section 12 of the 1889 Act looking towards the purchase of unallotted lands. After Gregory county was organized in 1898, an unsuccessful effort was made to obtain legislation direct-

[5]"Sec. 9.* * *: *Provided,* That these sections [8-11] as to the allotments shall not be compulsory without the consent of the majority of the adult members of the tribe, except that the allotments shall be made as provided for the orphans."

ing the Secretary to appoint a commission of three to negotiate with the Rosebud Sioux for the outright cession of all Indian land in Gregory County. H. Rept. 486, 56th Cong., 1st sess. p. 2 (1900), (App. 44). In the next session, the matter was handled by a provision in the Indian Appropriation Act, generally empowering the Secretary to use Indian inspectors to negotiate agreements with any Indians for the cession of unallotted land "subject to subsequent ratification by Congress." Act of March 3, 1901, c. 832, 31 Stat. 1058, 1077.

Over the next nine years, Congress enacted three statutes (1904, 1907 and 1910 Acts), each opening unallotted land in a county within the Rosebud Reservation (Gregory, Tripp and Mellette). Senator Gamble and Congressman Burke of South Dakota were the prime actors in initiating and moving the legislation. Throughout this period, the two legislators were members of the respective Committees on Indian Affairs.[6] Another major figure was Inspector McLaughlin, the "Indians' friend", who initially had the trust of the Sioux. The Congressional delegation particularly requested his services and he was designated to deal with the Rosebud Indians as well as with the other South Dakota and North Dakota tribes.[7]

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[6]*Who Was Who in America*, Vol. I, p. 437 (1966 ed. Marquis Pub., Chicago); 35 Cong. Rec. 388; *National Cyclopaedia of American Biography*, Vol 43, p. 141 (1967 ed. University Microfilms, Ann Arbor); 35 Cong. Rec. 243.

[7]McLaughlin was employed in the Indian Service for 40 years (1871-1910). He negotiated 13 of the 21 surplus land acts, including all three with Rosebud (p. 14a, Items 1, 2, 4, 6, 8, 9, 10, 13, 15, 16, 18, 19, 21). McLaughlin spoke Sioux and was particularly valuable to the Government in negotiations with the Sioux because he had married into the Sioux tribe. See, Council

[Footnote continued]



In the Spring and Summer of 1901, Inspector McLaughlin met with Indian councils on the Rosebud Reservation and obtained the written consents of three-fourths of the male adults[8] to an agreement for the outright cession of about 416,000 acres of the tribal land in Gregory county for the "fixed, definite, lump sum" of $1,040,000, subject to ratification by Congress. (Sen. Doc. 31, 57th Cong., 1st sess., pp. 28-35 (1901), App. 381-392).[9] The agreement was never ratified. (Pet. App. 16.)

A bill (S. 2992) to ratify the inspector's agreement passed the Senate on May 8, 1902 over stiff opposition arising from two provisions added to the simple ratifica-

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proceedings, December 15, 1906, (App. 000). McLaughlin, *My Friend the Indian*, p. 297, (Houghton Mifflin Company 1910) (L.C. E77M162). The South Dakota delegation in Congress specifically asked that Inspector McLaughlin be assigned to the Rosebud dealings. See S. Rept. 887, 60th Cong., 2d sess., p. 3 (1909), (App. 998-999).

[8]A total of 1031 signatures was obtained, 12 more than a three-fourths majority. The signatures were not obtained in open council. The council meeting, at which agreement was reached on September 11, 1901, was attended by only 60 Indians. Sen. Doc. 31, 57th Cong., 1st sess. p. 23, (1901), (App. 368). The agreement was submitted for signatures on September 14, and was transmitted to Washington three weeks later by letter of October 5, 1901. *Idem*, pp. 5, 28, (App. 319, 381-384). In the interval, apparently McLaughlin and the Agency superintendent toured the reservation and solicited signatures. See McLaughlin's acknowledgment of "the valuable assistance rendered me by Agent McChesney in obtaining the required number of signatures * * * after the agreement was reached; * * *." *Idem*, p. 7, (App. 325). Also H. Rept. 443, 58th Cong., 2d sess. p. 7 (1904), (App. 642-643).

[9]The agreement dated September 14, 1901 is set out in the preamble of the Act of April 23, 1904, c. 1484, 33 Stat. 254 (p. 1a, *infra*). Part of the agreement appears in the opinion below. (Pet. App. 15.) The signatures are listed in Sen. Doc. 31, *supra*, (App. 384-391). The Commissioner of Indian Affairs had instructed McLaughlin that the "consideration to be paid the Indians for the surplus lands in question should be a fixed, definite, lump sum." (Letter dated March 19, 1901, p. 4, App. 55.)

tion. One would have permitted homesteaders to acquire the land without charge and the other would have granted school sections 16 and 36 in each township, or lands in lieu thereof, to the State.[10] The House Committee on Indian Affairs recommended simple ratification without the amendments on the ground that land purchased with appropriated public funds ought not be given away to homesteaders and on the further ground, that the grant of school lands was unnecessary because "under existing law sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title."[11] The House took no action.

The next year (1902) new bills were reported out designed to overcome the opposition. The objectionable free homestead provision was eliminated. To avoid the expenditure of Federal funds, the bills were framed to carry out "a new policy in acquiring lands from the Indians [by] providing that the lands shall be disposed of to settlers,* * *and the money to be paid to the Indians only as it is received * * * from the settlers." (Pet. App. 19.) To make sure that the opposition was satisfied, the bills, as reported, affirmatively specified that nothing "in this act contained shall in any manner bind the United States to purchase any portion of the land herein described * * * [except the school lands] or to dispose of said land except * * * [by sale to settlers]; or to guarantee to find purchasers for said lands* * *."[12]

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[10]S. Rept. 662, 57th Cong., 1st sess. pp. 1-2 (1902) (App. 274-275); Debates – 35 Cong. Rec. 3187-88, 4801-07, 5019 (1902), (App. 61-70, 76-112, 237-238). Pet. App. 16-19.

[11]H. Rept. 2099, 57th Cong., 1st sess. p. 1 (1902), (App. 289-290).

[12]S. Rept. 3271, 57th Cong., 2d sess. pp. 1, 2, (1903) adopting H. Rept. 3839, 57th Cong., 2d sess. (1903), (App. 450-453). The same language appears in the last section of each of the three Rosebud Acts (pp. 6a, 9a, 13a, *infra*).



While the bills were before the committees, this Court on January 5, 1903, handed down its decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553, holding that a statute that "purported to give an adequate consideration for the surplus lands" (p. 568) was within the Constitutional power of Congress, even though the tribe did not consent by the three-fourths majority required by an earlier treaty. Taking cognizance of *Lone Wolf*, the committee reports specified that "while it is probably true that it is not necessary to secure the consent of the Indians * * *, in view of the [1868] treaty stipulation [requiring a three-fourths majority] * * * it would be better to require the treaty as amended to be accepted by the Indians before it becomes effective." S. Rept. 3271 on S. 7390, *supra*, p. 2 (App. 453). Accordingly, the bills as reported out called for tribal consent.

Again McLaughlin was sent to Rosebud where he spent a good part of the summer of 1903 in an effort to obtain the signatures of three-fourths of the male adults to "a new agreement * * * along the lines proposed in Senate Bill No. 7390 * * *." (Pet. App. 20, n. 28.) Extended councils on six days in July and August 1903 produced only 90 signatures[13] to an "agreement" dated August 10, 1903.[14] A 16-day, 400-mile tour of the reservation soliciting signatures still left McLaughlin 296 short of the requisite 1033 required for the three-fourths majority,[15]

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[13]Minutes of councils held at Rosebud, South Dakota, July 14, 29, and 30, August 7, 8, 10, 1903, (App. 467-522). The reference to the 90 signatures appears in the council minutes at page 50 and in McLaughlin's report of August 31, 1903, p. 4, (App. 521, 528).

[14]The "agreement" is set out in the preamble of the 1904 Act, p. 1a, *infra*.

[15]Report dated August 31, 1903, from McLaughlin to the Secretary of the Interior, App. 528. For the number constituting a three-fourths majority, see App. 528.

although he did procure 48 more than a simple majority. (Pet. App. 22.)

At the next session of Congress following McLaughlin's report (August 31, 1903), a fresh bill (H.R. 10418) was introduced for the avowed purpose of amending and ratifying the inspector's 1901 agreement. The bill was substantially the same as S. 7390 that McLaughlin had carried to the reservation except that it followed the format of the ultimate 1904 Act and did not call for the Indians' consent.[16] The Secretary of the Interior joined with the Commissioner of Indian Affairs in recommending that, since the bill proposed "to open the surplus lands * * * without the consent of the Indians * * *", the bill should be amended "to insure the procurement to the Indians of an average price of at least $2.50 per acre * * *" representing payment of the lump sum of $1,040,000, the consideration agreed to by the three-fourths majority that adopted the 1901 agreement.[17] The bill as reported out disregarded the committee report.[18] During the debate, Congressman Burke, the sponsor of the bill, told the House that "forty-eight more than a majority [of the tribe] consented to accept the terms of that bill" but he did not mention that under the treaty a valid consent required a three-fourths majority and he did not mention that the bill before the House was substantively different from the instrument for

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[16]37 Cong. Rec. 152, November 9, 1903. The bill is set out in 38 Cong. Rec. 1422 (January 30, 1904), (App. 544-552).

[17]Letter dated January 9, 1904, Commissioner of Indian Affairs to the Secretary and the Secretary's letter of the same date. H. Rept. No. 443, 58th Cong., 2d sess., pp. 6, 8, (1904), (App. 640-641, 645-647).

[18]H. Rept. No. 443, *supra*.



which McLaughlin had solicited signatures.[19] That instrument called for consent.

On the Senate side, protests on behalf of the Indians were disregarded.[20] The House report was adopted *in toto*.[21] There was no substantive debate.[22] The bill became the Act of April 23, 1904, c. 1484, 33 Stat. 254 (p. 1a-6a), *infra*). In the next five days, five more bills became laws opening other Indian reservations, all with essentially the same provisions as the Rosebud 1904 Act. (See p. 14a *infra*, Items 3, 4, 5, 6.)

Before the Indians had received the benefit of any proceeds for land sold to settlers under the 1904 Act, bills were introduced to open the Tripp county portion of the reservation. (Pet. App. 34, n.55.) Again Inspector McLaughlin was assigned to negotiate. His instructions reminded him of the 1868 Treaty requirement of a three-fourths male adult majority and at the same time directed him to "explain to them with great particularity" that under *Lone Wolf v. Hitchcock*, Congress had "the right to open their lands without their consent: * * *."[23] Pending McLaughlin's efforts, the committees of Congress held the bills in abeyance. (Pet. App. 35.)

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[19]38 Cong. Rec. 1423 (January 30, 1904), (App. 553-557).

[20]Sen. Doc. 158, 58th Cong., 2d sess. (1904), (App. 711).

[21]The Senate committee adopted House Report No. 443 *supra*. S. Report. No. 561, 58th Cong., 2d sess. (1904) set out at 38 Cong. Rec. 4985-4988 (April 18, 1904), (App. 594-603).

[22]38 Cong. Rec. 4988, (App. 625-626).

[23]Letter dated December 5, 1906, Commissioner of Indian Affairs to McLaughlin, p. 10, (App. 941); Pet. App. 34-35. Burke bill, H.R. 20527, introduced December 3, 1906, 41 Cong. Rec. 15; Gamble bill, S.6618, introduced December 5, 1906, 41 Cong. Rec. 50-51.

McLaughlin held councils at Rosebud on seven days in December 1906 and January 1907, in the deep of winter when the weather promised a low attendance. The Indians were called on to agree to the bill (H.R. 20247) introduced by Congressman Burke. There were objections, proposals and counterproposals. Finally, McLaughlin prepared an instrument dated January 21, 1907, in the form of an act of Congress.[24] In open council McLaughlin obtained only 43 signatures (thumb prints). He then toured the reservation as he had done with his 1901 and 1903 "agreements" and solicited additional signatures. (See. p. 7, fn. 8, *supra*.) With all that, he still fell 321 signatures short of the requisite three-fourths majority, although he obtained 21 more than a simple majority.[25]

The Secretary, by letter of February 14, 1907, recommended that the inspector's agreement be substituted for the pending bill. No mention was made of the lack of the requisite three-fourths majority consent.[26] The House Committee disregarded the Secretary's suggestion and reported out a second Burke bill (H.R. 24987) substantially in the form of the 1907 Act ultimately enacted.[27] During the debate,[28] Congressman Burke represented to the House that "The Indians, as I have

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[24]The instrument appears in H. Rept. 7613, 59th Cong., 2d sess. pp. 5-8, (App. 907-914).

[25]Letter dated February 12, 1907 from McLaughlin to the Secretary of the Interior, pp. 3, 4 (App. 868A); H. Rept. 7613, 59th Cong. 2d sess. p. 7 showing 705 of 1368 qualified Indians signed. Pet. App. 35.

[26]H. Rept. 7613, supra, p. 4, (App. 906).

[27]H. Rept. 7613, 59th Cong., 2d sess. (1907), (App. 908-914). H.R. 24987 was introduced January 26, 1907, 41 Cong. Rec. 1782.

[28]41 Cong. Rec. 3103-05, February 16, 1907, (App. 877-887).



stated before, have agreed to the disposition of it under the terms of the bill" by 42 more than a majority of the male adults, but again did not tell the House that this was far shy of the three-fourths male majority required by the 1868 Treaty. (Pet. App. 39 quoting from 41 Cong. Rec. 3104.) On the Senate side, Senator Gamble of South Dakota speedily moved the bill out of committee (S. Rept. 6838, 59th Cong., 2d sess. (1907), (App. 915-930)) and through the Senate with an amendment favorable to the Tribe but abandoned in conference. (Pet. App. 37.)

The 1907 Act lands were opened to settlers as of March 1, 1909. (37 L.D. 122.) Well before that date, Senator Gamble introduced a bill, substantively the same as the 1907 Act, to open the unallotted reservation land in Mellette county and a part of Todd county (S. 7379 introduced December 9, 1908; Pet. App. 45, n. 89). The Secretary of the Interior recommended that the bill be limited to Mellette county and suggested that even though under *Lone Wolf* the consent of the Indians was not necessary, "the views of the Indians should be procured before the bill is finally acted on, * * *." S.Rept. 887, 60th Cong., 2d sess. p. 3 (1909), (App. 998). The Senate Committee rejected teh suggestion because "it would delay the consideration of the matter unduly if action were withheld for that purpose, [consultation with Indians]." (*Idem*, App. 996.)

Senator Gamble failed in his effort to bring S. 7379 before the Senate[29] during the second session of the 60th Congress. However, after Congress adjourned, Inspector McLaughlin again was ordered to Rosebud, not to obtain the consent of the Indians, but "to take up with the Indians of the Pine Ridge and Rosebud Reservations

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[29]Pet. App. 45, n. 91; 45 Cong. Rec. 1679, February 1, 1909.

the matter of opening parts of these reservations to settlement * * *."[30] McLaughlin held three councils at Rosebud in March and April 1909, (Pet. App. 45, ns. 92, 93). He told the Indians "I am not here to ask you to touch the pen or make any agreement at this time. This requirement has been discontinued since the Supreme Court [decision in *Lone Wolf*]." (App. 1032.) He acknowledged the Indians' opposition "to the opening of any more of your reservation." (App. 1020.) He repeatedly reminded the Indians that under *Lone Wolf* Congress had the power to open the lands without their consent. (App. 1021, 1030, 1032, 1033.) The Indians answered that if the United States could "take away our land [without our consent] why did you not stay at home." (App. 1034.) They opposed the opening of the reservation.

In the next session of Congress (January 1910), new bills were reported out and the Senate bill became the Act of May 30, 1910.[31] Two other surplus land acts were adopted at about the same time. (See p. 14a, Items 19, 20, *infra.*)

With the adoption of the 1910 Act, all of the reservation, as established by the 1889 Act, had been opened except the Todd county area. In 1911 a bill was introduced to open Todd county. Again McLaughlin was

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[30]Letter dated April 2, 1909 from the First Assistant Secretary of the Interior to McLaughlin. (App. 1010.)

[31]Again, during the debates, the Senate was misled into believing that the Indians had consented. Senator Gamble of South Dakota erroneously stated (Pet. App. 49): "The Indians themselves agreed to the provisions of this bill after it had been submitted to them for their consideration." (Pet. App. 48-49, 45 Cong. Rec. 1074, January 27, 1910.) The fact is that except for a few "young men" who spoke up, the Indian spokesmen opposed the proposition that they give up their land "without consent." No vote was taken. No signatures were solicited.



sent to Rosebud. The bill was reported out and passed the Senate but it went no further.[32] Otherwise, according to the decision below, there would be no Rosebud reservation.

To avoid continuing jurisdictional conflicts, the Tribe brought this suit charging that State authorities were interfering with tribal self-government by exercising jurisdiction over Indians on those portions of the reservation opened by the three Rosebud statutes. The Tribe asked for judgment that the three statutes did not disestablish any part of the Rosebud reservation as bounded by the 1889 Act. The district court entered judgment that the three statutes "did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in said counties by returning them to the public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota [the only area not opened by a surplus land statute]." (Pet. App. 114.) The court of appeals affirmed. (Pet. App. 61.)

The court of appeals regarded the broad words of cession in the 1901 "agreement" "completely to extinguish every vestige of Indian title * * *". (Pet. App. 16.) The court ruled that the 1904 Act in fact ratified the 1901 agreement, amended "solely with respect to the method of payment". (Pet. App. 23.) On that basis the court construed the 1904 Act to be a "cession of the County of Gregory" with "the reservation *pro tonto* extinguished". (Pet. App. 26.) The court held that under

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[32]S. Rept. 1166, 62d Cong., 3d sess. (1913); 49 Cong. Rec. 3, 4210; App. 1302, 1303-1306.

the 1904 Act the land was "ceded, granted and conveyed" to the United States. (Pet. App. 28, n. 45.)

The court of appeals next turned to the 1907 and 1910 Acts. The court equated the 1907 Act with its concept of the 1904 Act saying "[T]he 1907 Act is, in substance, identical to the 1904 Act: * * *" (Pet. App. 38), with the same continuity of purpose (*idem*, 38-39) "and contains similar language of cession." (*idem*, 40). (The 1907 Act contains no language of cession.)

The court of appeals agreed that "the 1910 Act was not preceded by formal negotiations and agreement with the Rosebud Indians". (Pet. App. 44.) Even so, the court fitted the 1910 Act into the same cast it had provided for the 1904 and 1907 Acts. The court observed that "[T]he 1910 Act is substantially similar to the 1907 Act. Its operative language is identical: * * *." (*Idem*, p. 46.) The court stated (*idem*, p. 48):

> "Again, we find nothing in the language of the 1910 Act or in the surrounding circumstances and legislative history which indicates a change in that congressional determination to alter the reservation boundaries *which we have found in the 1904 and 1907 Acts.*"[33]

The court concluded that Congress "still considered the 1910 Act to effect a *cession* of Indian lands." (Pet. App. 55.)

## SUMMARY OF ARGUMENT

1. The Rosebud Indian Reservation, as established and delimited by the Act of March 2, 1889, is an Indian reservation and therefore is "Indian country" as that

[33]Emphasis supplied throughout this brief unless otherwise noted.



term is defined in 18 U.S.C. 1151. No part of the Rosebud Reservation was terminated by the 1904, 1907 and 1910 Acts opening the unallotted lands on three-fourths of the Reservation for sale to settlers with the proceeds from the sale to be credited to the Tribe "only as received".

2. Under the principles controlling the construction of Indian statutes, an Indian reservation, once established by Congress, will not be terminated unless the congressional intent is expressed on the face of the statute, or is clear from the surrounding circumstances and legislative history.

3. None of the three Rosebud statutes contains words of termination. All three were unilateral. The Tribe did not consent. There was no cession. There were no payments by the United States. The land was not made part of the public domain. Each of the three Rosebud statutes explicitly declares that the United States is not a purchaser, does not guarantee to find purchasers and is acting only as a trustee to sell the land and credit the proceeds, if any, to the Tribe, "only as received". Beneficial title never left the Tribe. Land that the United States did not sell to settlers continued to be the property of the Tribe.

4. The fundamental error below is that the court of appeals *assumed* that the three statutes ceded the unallotted land to the United States outright. That erroneous assumption was the predicate for the conclusion that Indian title was extinguished, the land returned to the public domain and the reservation terminated. That same erroneous assumption led the court of appeals to search for an indication that Congress did *not* intend the assumed cession to terminate the reservation, when the court should have searched for an expressed Congres-

sional intent to extinguish the reservation. If that unfounded assumption of cession is lifted from the opinion, the entire decision and its conclusion collapse. All else in the brief is commentary on the errors that are the by-product of the court's erroneous assumption.

5. The best and primary evidence of Congressional intent is the text of the acts themselves. The erroneous assumption of an outright cession to the United States is reflected in the court of appeals' treatment of the language of the three statutes. The court of appeals ignored all language in the statutes except that which the court considered supported its ultimate conclusion of termination and it misconstrued that language. Thus, (a) the court ignored the explicit, key language in each statute wherein the United States affirmatively disclaimed that it was purchasing the land, or guaranteeing to find purchasers. The court's assumption that the three statutes were outright cessions cannot be squared with this language; and the court did not square it or otherwise explain it; (b) the court ignored the language that vested the proceeds from the sale of the land in the "Indians belonging and having tribal rights on the Rosebud Reservation". Under the court's determination, Indians living on the opened portions of the reservation would be living on ceded land and would be off-reservation Indians, not entitled to share in the proceeds; (c) the court is silent as to the language of the three Acts reaffirming the Tribe's right to its full reservation and other treaty benefits not inconsistent with the Acts; and (d) the court ignored the language of the statutes reserving tribal land for Indian purposes and donating to new towns a portion of the tribal land in townsites and 20% of the Tribe's proceeds from the sale of townsite lots for public buildings, schools and parks. On the court's assumption



of an outright cession, there was no reason for this tribal donation.

6. The 1907 Act directed that before the Tripp county land was opened, the Secretary should grant new allotments of 160 acres to each eligible child and should permit any Indian within the Reservation to relinquish and select a lieu allotment anywhere within the Reservation, including Tripp county. The point is that terminating the Tripp county portion of the reservation cannot be reconciled with simultaneously permitting the selection of some 600 or 700 new allotments in Tripp county and permitting some 80 allottees of poor land to exchange for lieu allotments in Tripp county.

The court of appeals ignored the provision for 600 or 700 new allotments and confined itself to the 80 lieu allotments but did not reconcile them with its premise of an outright cession to the United States. Neither of those allotment provisions is compatible with the court's assumption of an outright cession that ~~could~~ WOULD put these allotments out on the public domain off the reservation.

7. The 1910 Act authorized new allotments in the Mellette county portion of the reservation before it was opened and also afforded Indians with allotments "on the tract to be ceded" (Mellette county) the option of relinquishing and taking lieu allotments "on the diminished reservation". Again, the point is that terminating the Mellette county portion of the reservation with over 1000 Indians and 1949 allotments is inconsistent with authorizing new allotments in Mellette county.

Again, the court of appeals ignored the language authorizing new allotments and confined itself to the lieu allotment language. The court affirmed the district court's move or lose view, that a Mellette county allottee

could either move to the unopened portion of the reservation (Todd county) or lose the right to take a lieu allotment. The language is easily susceptible of the more harmonious construction that the word "diminished" as used in the 1910 Act included the opened Mellette county. No reason is advanced for Congress to authorize new allotments in Mellette county and at the same time forbid allottees established in the Mellette county portion of the reservation from selecting new allotments in that portion of the reservation. Under the court's assumption of an outright cession, some 1949 allotments in Mellette county, plus all the new allotments to eligible children, would be out on the public domain and off the reservation. Any of the 1949 allottees who wished to be on-reservation Indians would have to surrender their land and move to the unopened portion of the reservation (Todd county).

8. Lands embraced in Indian reservations are excluded from the school land grant in the South Dakota Enabling Act "until the reservation shall have been extinguished and the land returned to the public domain". Each of the three Rosebud Acts reserved the school sections from entry and granted those lands, or lands in lieu thereof, to the State. If the school land grant had been omitted from the Rosebud Acts, the State would not have received the land because the Rosebud Acts did not extinguish the reservation. The court of appeals concluded that the grant in the Rosebud Acts was "to implement the grant in the enabling act and for no other reason" on the premise that Congress understood "that the reservation would be extinguished". The court does not explain what it meant by "implement". On the court's erroneous assumption that the Rosebud statutes were outright cessions, there was no reason for the



explicit school land grant in each of the three Rosebud Acts. The grant in the Enabling Act would have attached. If the court of appeals sought to find extinguishment on the premise that Congress understood that the reservation would be extinguished, it erred again. That premise does not rest on the statutory language, but on erroneous expressions of law and fact by members of Congress, all contrary to the legal effect of the statutes themselves. Such erroneous recitations of members of Congress, or even committees of Congress, are not valid evidence of intent.

9. The 1910 Act extended the Federal laws prohibiting the introduction of liquor into Indian country, to the Mellette county portion of the reservation for a period of 25 years. This made the opened area "dry", regardless of whether the land was held in trust or in fee. Without the 25-year extension, only trust land would have been "Indian country" subject to the liquor laws. The court did not deal with the liquor provision to ascertain *whether* reservation status was terminated. Based on its erroneous assumption that the three Rosebud Acts were outright cessions, the court of appeals simply ruled that the liquor provision was nothing more than the exercise of a congressional power to control intoxicants on land ceded to the United States by an Indian tribe. The Tribe's position is that the liquor provision did not diminish but enlarged the Federal protection to the large number of Indians on the opened area, and that if there were doubt as to whether the liquor provision connoted termination, the rules governing the construction of Indian statutes dictate that the doubt be resolved in favor of retaining the reservation status.

10. By dredging subsequent legislation, references are found to "lands in the Rosebud reservation" or lands

"formerly within the Rosebud Indian Reservation", or like phrases. The court of appeals confined itself to phrases of the latter variety to bolster its erroneous assumption of an outright cession. Viewed as a whole, subsequent legislation, not in *pari materia,* whether pro or con, is not a reliable indicator of the Congressional intent expressed in the earlier Rosebud statutes, since in the subsequent statutes Congress was not focusing on the issue of termination.

11. Ever since the Rosebud Reservation was established, the entire Reservation as defined by the 1889 Act has been administered with Federal funds as an Indian reservation. This is confirmed by Interior's construction and practical administration of the landmark Indian Reorganization Act of 1934. That Act provided the authority for extending the period of trust of only those allotments located on an Indian reservation. All trust allotments on the Rosebud Reservation have been protected by the statutory extension of the period of trust. According to the court of appeals, upon enactment of the Rosebud statutes the land was ceded outright to the United States and became part of the public domain. This meant that the trust period on thousands of allotments in the opened areas has long ago expired, since, according to the court below, such allotments were not located on the reservation after the Rosebud statutes became law. This also meant that all Indians living in the opened portions of the reservation became off-reservation Indians no longer entitled to the Federal benefits provided for on-reservation Indians only.

12. The Indian Reorganization Act also authorized the Secretary to restore to the Tribe the remaining lands of any Indian reservation not disposed of under a statute opening the lands to sale. The Secretary listed land opened by the three Rosebud Acts, as well as by other



similar statutes, as coming within the provisions of the Indian Reorganization Act. Under the court of appeals' assumption that the Tribe ceded outright, such land was the property of the United States and part of the public domain and therefore the Secretary had no authority to restore the land to the tribes because it was not within any Indian reservation.

13. Other highlights of administrative recognition of the Rosebud Reservation as established by the 1889 Act are found in the 1935 approval of the Tribal Constitution defining the jurisdiction of the Tribe as extending to the area defined in the 1889 Act and the Field Solicitor's opinion that no part of the Rosebud Reservation had been terminated.

## ARGUMENT

### I.

### ALL OF THE ROSEBUD INDIAN RESERVATION AS ESTABLISHED BY CONGRESS IS INDIAN COUNTRY.

As defined by Congress in 1948, "Indian country * * * means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * * Act of June 25, 1948, c. 645, 62 Stat. 757, as amended (18 U.S.C. 1151)[34] Congress established the

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[34]The pertinent text of Section 1151 reads as follows:

"* * * the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian

[Footnote continued]

Rosebud Reservation in the 1889 Act and it continues to be a reservation as established, unless portions have been terminated by the 1904, 1907 and 1910 Acts. An Indian reservation will not be extinguished where there is doubt as to the intent of Congress. "This Court does not lightly conclude that an Indian reservation has been terminated. * * * The congressional intent must be *clear*, to overcome 'the general rule that [d]oubtful expressions are to be resolved in favor of the [Tribe]' * * *. Accordingly, the Court requires that the 'congressional determination to terminate * * * be expressed on the face of the Act or be *clear* from the surrounding circumstances and legislative history'." *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975).

Where a tribe voluntarily, by mutual agreement, cedes and sells to the United States for a sum certain all of its unallotted land on a reservation and Congress ratifies such an agreement, the intent is clear. Indian title and the reservation are extinguished. The ceded land becomes part of the public domain. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The root error of the court below lies in its procrustean fit of this case into the *DeCoteau* mold. The court of appeals erroneously assumed each of the three Rosebud statutes to be an outright cession of the unallotted land to the United States. From this false assuption flowed the erroneous conclusions that Indian title was extinguished, the land was returned to the public domain and the three

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communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."



opened portions of the Reservation were terminated. Once the court below assumed an outright cession to the United States, the court could find no difference between this case and *DeCoteau* except "in the method of payment". (Pet. App. 23, 26, 31-33, 49.)

On the basis of the erroneous premise of an outright cession, the court below concluded that, even absent statutory language, Congress, by implication, breached its treaty obligations, terminated the affected portions of the reservation, placed the opened land ("ceded" in the court's dichotomy) in the public domain and off the reservation, took from thousands of Indians the rights, benefits, privileges and protection that the Federal law affords to on-reservation Indians, and placed in jeopardy the trust status of thousands of allotments whose period of trust had expired if they were not located on the Reservation. If the false assumption of an outright cession is lifted from the opinion, the entire decision and its ultimate conclusion collapse.

The gross error of an outright cession for a predicate led the court of appeals to err in its basic approach. The court reasoned that Congress must have terminated the reservation because the court could not find an affirmative, expressed intent not to terminate. Thus, the court could not find "any indication in substantial support of the claim * * * that the exterior boundaries * * * were to be left undisturbed despite the *cession* of the County of Gregory" (Pet. App. 26). The court could find no disclosed intention "to preserve intact the area of the original reservation and its boundaries." (Pet. App. 33.) The court projected this thesis to the 1907 and 1910 Acts. As to the 1907 Act, the court of appeals could find nothing to indicate "a change in that congressional determination to alter the reservation

boundaries which we have found in the 1904 Act" (Pet. App. 38). As to the 1910 Act, the court pyramided its deductions saying it could "find nothing in the language of the 1910 Act or in the surrounding circumstances and legislative history which indicates a change in that congressional determination to alter the reservation boundaries which we have found in the 1904 and 1907 Acts." (Pet. App. 48.)

The court's search should have been for an expressed affirmative intent to extinguish the reservation status in accordance with the principle that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). Instead of examining the statutes and their history to ascertain *whether* there was an outright cession, the court *assumed* a cession. This removed any reason for a meaningful examination of the statutory language and led the court, in effect, to charge that Congress, by implication and innuendo, abandoned its solemn treaty obligation to make the Rosebud Tribe secure in its Reservation and not to strip the Tribe of its treaty rights and privileges. *Northern Cheyenne Tribe v. Hollowbreast*, ____ U.S. ____, 48 L.ed.2d 274, 280 (1976); *Bryan v. Itasca County, Minnesota*, ____ U.S. ____, No. 75-5027, slip op. pp. 7-8, June 15, 1976.

The devastating consequences of the decision below—a decision the district court characterized as having "great political, social, cultural and economic effects" (Pet. App. 112),—ought not be inflicted on an Indian tribe unless there is no alternative. To destroy the reservation status is to destroy a way of life. To reach so extraordinary a result, the court of appeals bypassed the controlling language of the statute and departed from the principles



that govern the construction and interpretation of Indian statutes. The court abandoned the rule of construction that Indian statutes are to be liberally construed and that all doubts and ambiguities must be resolved in favor of the Indians. *Bryan v. Itasca County, Minnesota*, ____ U.S. ____, No. 75-5027, slip op. pp. 12, 18-19 and cases cited, June 15, 1976; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-175 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

This "eminently sound and vital canon", *Northern Cheyenne Tribe v. Hollowbreast*, ____ U.S. ____, 48 L.ed. 2d 274, 280, n. 7(1976) is not a mere canon of statutory construction "easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the Nation's obligations to the conquered Indian tribes." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (C.A. 9, 1975), cited with approval in *Bryan v. Itasca County, Minnesota, supra*, p. 14. These canons have particular force where the destruction of a reservation is implied from a statute that contains no language of termination and no expressed intent to terminate the reservation. Such language and intent might be expected "if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." *Bryan v. Itasca County, Minnesota, supra*, p. 7.[35]

Those canons are tools to give life to this Court's decisions that the duties owed by the United States to

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[35] *Idem*, p. 19, where the Court stated: "This principle of statutory construction has particular force in the face of claims that the ambiguous statutes abolish by *implication* Indian tax immunities." The same principle applies to other immunities.

Indian tribes are to "be judged by the *most exacting* fiduciary standards." *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942). "These Indian tribes *are* the wards of the Nation." *United States v. Kagama,* 118 U.S. 375, 383 (1886). (Emphasis in original.) "* * * the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne,* 264 U.S. 446, 448 (1924). *"The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right,* without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." *Choctaw Nation v. United States,* 119 U.S. 1, 28 (1886).

These broad and humane principles appeal to the highest standards of honor and morality fitting the situation where the guardian deals with the land of its unprotected, uninformed and dependent ward. They take on double significance, where, as here, the United States represents conflicting interests—the fiduciary relationship with the voteless Indian whose land it held in trust, versus the nonIndian citizens who demanded that the reservation lands be opened.

Here, there was no call to go beyond the purpose expressed on the face of each of the three statutes—to open the land to settlers. Nothing more. There were no words of termination. The court below had no reason or basis for assuming a cession where the language of the statutes precluded a cession.



The correct facts and the correct law are that none of the three Rosebud statutes contains words of termination. All three are unilateral actions. The Tribe did not consent to any of them. The Tribe did not cede or sell any land. The United States did not buy any land. None of the land was returned to public domain. The court below assumed or implied all of these and other factors to reach its conclusion of termination. In fact, the three statutes did no more than open the unallotted land at the prices fixed in the statutes, with the Tribe to receive nothing, unless the land was entered and the entrymen made payment. Beneficial title to each tract remained in the Tribe until each entryman made full payment and did all else required of him to earn a patent.

## II

## THERE WAS NO CESSION, TRIBAL TITLE WAS NOT EXTINGUISHED, AND NONE OF THE LAND WAS "RESTORED" OR OTHERWISE MADE PART OF THE PUBLIC DOMAIN.

**A. There was no cession.** A cession is a sale, a conveyance, a bilateral transfer of property. To cede means "To yield up; to assign; to grant. Generally used to designate the transfer of territory from one government to another." *Blacks Law Dictionary,* (Rev. 4th ed.), p. 282. There can be no "yielding up", no "assignment", no "grant", no "cession", without action by the landowner. A cession is a voluntary act, a voluntary conveyance. *Cook v State,* ____ S.D. ____, 215 N.W.2d 832, 836 (1974). Rosebud never yielded, assigned, granted, ceded, sold, or conveyed, an acre of reservation land to the United States under any of the three acts.

All three Rosebud statutes were unilateral acts of Congress. A unilateral act of Congress cannot be a

"cession". There is no mutual agreement as in *DeCoteau*, *supra*. None of the three Rosebud statutes could or did vest the United States with ownership of a single acre of land except for the school sections, and those the Government acquired by eminent domain.[36]

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[36]As to the school lands for which the United States paid an arbitrary $2.50 per acre, the United States is liable for taking under the Fifth Amendment and must pay just compensation represented by the value of the land as of the date of taking, i.e., the date title passed to the State (date of approval of survey) (*United States v. Wyoming*, 331 U.S. 440 (1947)), plus interest at 5% from the date of taking until payment is made. *Confederated Salish & Koontenai Tribes v. United States*, 193 Ct. Cl. 801, 813, 826, 437 F.2d 458, 464, 472 (1971) (involving the 1904 surplus land act affecting the Flathead Reservation approved the same day as the Rosebud 1904 Act (p. 14a *infra*, Item 3)); *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 558, 390 F.2d 686, 694 (1968), (involving the 1910 Act at Fort Berthold substantively identical with and approved two days after the 1910 Rosebud Act (p. 14a, Item, 20, *infra*).

And where the tribe did not consent to the sale of its land under a surplus land act, and Rosebud did not consent, the United States became liable for a taking under the Fifth Amendment as of the date the patent to each 160-acre tract was issued to the settler or other purchaser. *Confederated Salish & Koontenai Tribes v. United States, supra*, pp. 819-820. 437 F.2d 468 (1971); *Lower Sioux Indian Community in Minnesota v. United States*, 30 Ind. Cl. Comm. 463, 474 (1973), affirmed ___Ct. Cl.___, 519 F.2d 1378 (1975), involving the 1904 surplus land act at Devils Lake (p. 14a, Item 4, *infra*).

If the court below is right, the Tribe ceded and title was extinguished and passed to the United States on the dates of the three surplus land acts. If that had happened, there could be no Fifth Amendment taking. But that is not what happened. Beneficial title to each tract entered remained in the Tribe until the entryman satisfied the requisites of the surplus land act, paid the purchase price and received his patent. The patent, not the statute, divested the tribe of its title. Up to the date of the patent, the United States could have withdrawn the land from sale. *Creek Nation v. United States*, 302 U.S. 620, 622 (1938). And it did withdraw the undisposed of lands in 1934. See p. 70, *infra*.



The United States could not have purchased the land. Title could not have vested in the United States. The affirmative declaration of the last section of each of the three statutes precluded a purchase or sale (see pp. 41-42, *infra*).

The court of appeals somehow conceived that a mutual agreement to sell and buy could be accomplished without tribal consent (Pet. App. 24-25). Referring to *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the court of appeals stated (Pet. App. 25):

> The effects of this decision, we note, were explained to the Indians by Inspector Mclaughlin in 1903, 1906, and 1909. *Consequently, it was clear that the vote of three-fourths of the adult male Indian population was no longer required as consent to cession of any portion of the Rosebud Reservation.*

*Lone Wolf* holds that the Constitution empowers Congress, without the consent of the Indians, to direct that tribal land be allotted and the remainder opened for sale to settlers with the proceeds credited to the tribe. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But the exercise of the Constitutional power is not a substitute for a mutual agreement between a tribe and the United States. Nor does the exercise of the Constitutional power alter the definition of tribal consent fixed by treaty so as to reduce the necessary majority from three-fourths of the male adults to a simple majority.

*Lone Wolf* means that no Rosebud consent was necessary for the enactment of a statute opening the land. But, *Lone Wolf* does not mean that consent to sell tribal land can be manufactured by legislative fiat. Nor can tribal consent be gained by any less than the three-fourths majority required by the 1868 treaty unless

Congress so specifies. Here it did not. The complete absence of a cession removes the underpinning from the determination below. Everything that follows in this brief is simply commentary on the many facets of the errors that flow from the court's false assumption of a cession.

**B. There was no payment.** The erroneous assumption that the Tribe had sold the land to the United States led the court below to the conclusion that "method of payment" was the only difference between the outright sale for a sum certain in *DeCoteau*, and the opening of the land for sale to settlers under the Rosebud acts. (Pet. App. 23, 26, 31-33, 49.)

The fallacy is patent. The word "payment" in the sense it is used by the court of appeals must mean the purchase price or consideration agreed upon by the buyer and seller. Thus, in the bilateral contract in *DeCoteau*, "payment" was the purchase price contracted by the parties. This Court pointed out that when Congress ratified the 1891 agreement with the Sisseton and Wahpeton, the United States was vested with ownership of the land and the Sisseton and Wahpeton were vested with the right to the agreed consideration of $2.50 per acre. *DeCoteau v. District County Court*, 420 U.S. 425, 448 (1975). In this case the Tribe could not be vested with a right to consideration. There was none.

In this case, there could not be a contract or consideration. Unlike *DeCoteau*, in the last section of each Rosebud statute, the United States disclaimed any intent to purchase or to pay. The court below had no basis for comparing the Rosebud statutes with the "payment" in *DeCoteau*. Here the United States paid nothing. If none of the land had been purchased by settlers, the land would have continued to be the property of the Tribe and there would have been no



proceeds. The Tribe, waiting for "payment", would be difficult to convince that $2.50 per acre in hand is the same as $2.50 per acre that might never come into being. This is not a difference in "method". This is a difference between a cession for a sum certain and no cession.

**C. The land did not become part of the public domain.** The court below held that the reservation area was terminated and the land was "returned to the public domain".[37] " 'Public domain' is equivalent to 'public lands', and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' " *Barker v. Harvey*, 181 U.S. 481, 490 (1901); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 17 (1935); *Minnesota v. Hitchcock*, 185 U.S. 373, 391-394 (1902). The Rosebud lands never were subject to sale or disposal under the "general laws".

Public lands of the United States are owned by the United States. Tribal lands are not public lands. *Missouri, K.&T.R. Co. v. United States*, 235 U.S. 37 (1914); *Leavenworth, etc., R.R. Co. v. United States*, 92 U.S. 733, 741 (1876); *Bennett County, South Dakota v. United States*, 394 F.2d 8, 11 (C.A. 8, 1968) and cases cited. Before tribal land can become public lands of the United States, the Indian title must be extinguished. This can be done by the sword, or by voluntary cession as in the case of the Sisseton and Wahpeton in *DeCoteau*, or by the exercise of eminent domain as in the case of the

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[37]The land never had been a part of the public domain and therefore could not be "returned" to the public domain. The reservation was a part of the aboriginal Sioux country. (See p. 3-5, *supra*.)

school sections (see p. 30, fn. 36, *supra*). But it cannot be done by opening the land to settlers with the proceeds to be credited to the Indians. Such land never becomes public land.

Whether the tribe does consent to the opening of its lands, as in the case of the Chippewas in *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), or does not consent, as in the case of Rosebud, makes no difference. Nor does it make any difference whether words of cession are used, or how broad those words are.[38] If there is both consent to opening lands and words of cession, the cession is not absolute, but in trust for a purpose. The purpose is that the United States will endeavor to sell the lands and credit the tribe with the proceeds only as received. Beneficial title remains in the tribe until the settler pays his money and earns his patent. *Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920); *United States v. Mille Lac Band*, 229 U.S. 498 (1913); *Minnesota v. Hitchcock*, 185 U.S. 373, 394-395 (1902); *United States v. Brindle*, 110 U.S. 688 (1884) at page 693, ("* * * the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust."). (Also see p. 30, fn. 36, *supra*.)

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[38]For example, the statute in *Minnesota v. Hitchcock, supra*, and *United States v. Mille Lac Band, supra*, provided that upon acceptance by the Chippewas, the act would constitute a "complate cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians * * *" and specified that "acceptance and approval of such cession and relinquishment * * * shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided." Act of January 14, 1889, c. 24, sec. 1, 25 Stat. 642. The treaty in *United States v. Brindle, supra*, did "cede, relinquish and quitclaim * * * all their right, title and interest * * *." The surplus land act in *Ash Sheep v. United States, supra*, to which the Crow consented, did "cede, grant, and relinquish to the United States all right, title, and interest."



To be sure, the preamble of the 1904 Act sets out the unratified 1901 agreement that contains the words "cede, surrender, grant and convey" (p. 1a, *infra;* Pet. App. 16). But the operating language of the 1904 Act, following the enactment clause, eliminated the agreement to sell and buy for $1,040,000 and substituted opening the lands to settlers with the proceeds credited to the Tribe. To the court of appeals this constituted a ratification of the 1901 agreement, amended "solely with respect to the method of payment". (Pet. App. 23.) This amounts to saying that wiping out an obligation of the United States to pay $1,040,000 and substituting a promise to try and sell the land in small tracts and pay the proceeds "only as received", displays only a difference in "method". This view was possible only because the court below closed its eyes to the last section of the 1904 Act where the United States spelled out that it was not buying or paying for the land.

Concededly, when an absolute cession extinguishes Indian title, as in *DeCoteau* "Indian lands ceased, without any further act of Congress, to be Indian country". *Dick v. United States*, 208 U.S. 340, 358 (1908). The land then became part of the public domain and was opened "to entry and settlement under the homestead and townsite laws". See Act of March 3, 1891, c. 543, sec. 30, 26 Stat. 989, construed in *DeCoteau, supra.* But, as noted (pp. 29-32, *supra*), not one acre of land opened by the three Rosebud statutes was the subject of a cession. None ever became part of the public domain. None was opened to free homesteads, or to homesteads for the public land price of $1.25 per acre. A settler could acquire Rosebud land only by satisfying the requirements of the Rosebud statutes including payment for the land at the prices fixed in those statutes. And the Rosebud prices

were higher and had no relation to prices, under the public land laws.[39]

**D. Selected phraseology does not support the court's conclusion that reservation status was terminated.** To bolster its assumption that the three acts were cessions that extinguished Indian title and returned the land to the public domain, the court below relied on the "language of diminution and extinguishment, [that] was used interchangeably with respect both to the proposed ratification of the 1901 Agreement and the passage of the 1904 Act" (Pet. App. 25-26); on excerpts from 1902 debates, the committee reports on the bill that became the 1904 Act (*idem*, p. 26, n. 43); and on phrases extracted from three council meetings held in 1901 and one held in 1903 (*idem*, p. 26).

**1. The words of cession lifted from the 1901 agreement and repeated in the 1904 Act have no legal effect.** The Government cannot create a cession any more than a stranger can deliver title to another's land by signing a warranty deed. Here there was no consent. There can be no cession, (pp. 29-32, *supra*). Even if there were consent the cession would not be absolute but in trust for the purpose of the trust, (p. 34, *supra*).

**2. The language in the 1902 debates and the 1904 Act committee reports does not support termination.** The

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[39]For example, Section 2 of the 1904 Act fixed prices ranging from $2.50 to $4 per acre, Section 3 of the 1907 Act from $2.50 to $6 per acre, and Section 4 of the 1910 Act at the appraised value. (See pp. 5a, 7a, 11a, *infra*.) If the entryman failed to make the annual payments promptly when due, "all rights in and to the land covered by his entry" ceased, the payments were forfeited and the entry canceled. The entryman was not entitled to a patent until all requirements had been satisfied including payment. 1904 Act—Sec. 2; 1907 Act—Sec. 3; 1910 Act—Sec. 6; pp. 5a, 8a, 12a, *infra*.



April 1902 Senate debate of a bill to ratify the 1901 agreement to cede the Gregory county land outright for a sum certain centered on the free homestead issue. Senator Clapp of Connecticut, not a manager or sponsor of the bill, quite collaterally observed that "because we have to pay the Indians * * * for the purpose of * * * *extinguishing the reservation* * * * it does not follow that the land is * * * worth so much an acre [to settlers]." (35 Cong. Rec. 4807, April 29, 1902, quoted at Pet. App. 19.) The court below apparently relied on the underscored words. The complete answer is that if the ratification bill under debate had become law, that portion of the reservation would have been extinguished. But the bill did not become law. The 1901 agreement was not ratified. There is no warrant for borrowing from the debate of the rejected ratification bill to read extinguishment into the unilateral 1904 Act.

The committee reports on the bill that became the 1904 Act recited that "the land that is proposed to be ceded by this bill * * * *is really only a corner of the reservation, which will be left compact and in a square tract* * * *."[40] The court of appeals relied on the underscored phrase. The same committee reports represented the bill as one "to ratify and amend [McLaughlin's 1901] agreement * * * providing for the cession to the United States of the unallotted [Gregory county lands] * * *."[41] In the debate on that bill, the House was informed that "forty-eight more than a majority consented to accept the terms of that bill [referring to a like bill in the prior session]. This bill is substantially the

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[40]H. Rept. No. 443, 58th Cong., 2d sess., p. 3, (1904) referred to in Pet. App. 26, n. 43 and quoted in Pet. App. 33-34.

[41]H. Rept. No. 443, *supra*, p. 1.

same * * *."[42] The underscored language on which the court relies must be read in the context of the impression given to Congress that the bill was one to ratify an outright cession agreed to by the Indians. In fact, it was not a cession and the Indians did not agree by the requisite three-fourths majority. (See pp. 9, 10, *supra.*) The law itself controls, not the erroneous statements in the legislative history.

3. **McLaughlin's phrases do not support termination.** The court of appeals placed great stock on eight phrases extracted from the transcripts of three meetings Inspector McLaughlin held with the Indians in 1901 and one meeting in 1903.[43] The court determined that the language of these phrases "admit of no other conclusion" but that "actual diminution [of the reservation] was involved" in the negotiations. (Pet. App. 26.)

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[42]App. 553-554, 38 Cong. Rec. 1423, January 30, 1904.

[43]1. "negotiating with you people for this corner of the reservation" (Pet. App. 13, n. 17, April 13, 1901).

2. "relinquish their allotments and remove to the reservation" (Pet. App. 13, n. 17, April 13, 1901).

3. "the diminished reservation"(Pet. App. 13, n. 17, April 13, 1901; *idem*, 14, n. 19).

4. "leave you a nice, square reservation" (Pet. App. 13, n. 17, April 13, 1901).

5. "removing to the diminished reservation" (Pet. App. 14, n. 18, April 15, 1901).

6. "disposing of this little corner of the reservation" (Pet. App. 13, n. 17, April 13, 1901).

7. "leave your reservation a compact, and almost square tract * * * about the size and area of the Pine Ridge reservation" (Pet. App 12, n. 16, September 5, 1901).

8. "you will still have as large a reservation as Pine Ridge after this is cut off" (Pet. App. 22, n. 32, July 30, 1903).



All eight phrases originated with Inspector McLaughlin, not the Indians. All but the eighth phrase were uttered in 1901 when McLaughlin was engaged in negotiating an outright cession, culminating in the unratified 1901 agreement to sell for $1,040,000. In that context, all phrases were correct. Indian title was to be extinguished. On the assumption that the 1904 Act was a cession, the court below used those phrases as expressing the Congressional intent to terminate. The assumption was wrong. The phrases were relevant to the 1901 agreement, but not to the 1904 Act and certainly not to the 1907 and 1910 Acts.

The eighth phrase was expressed at the council held July 30, 1903 when McLaughlin sought consent to a bill opening the lands and crediting the proceeds as received. This was the meeting where McLaughlin explained the "new departure" to mean that the Indians would not "receive a lump sum consideration for the land ceded but only what the Government is able to realize from the sale of the lands." (Quoted in Pet. App. 21-22.) McLaughlin could not say how much, or when, payments would be received from the settlers.[44] The Indians strongly resisted and McLaughlin answered (App. 490): "* * * You have said that you want to call this deal off. You are not using good judgment in coming to that decision. Congress wants the land opened; * * * and now it is for you to make the best bargain you can for the land. It is of no use to you now, you are deriving no revenue from it now.

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[44]McLaughlin (App. 489-490, July 30, 1903): "*I fear that this matter is not fully understood by you.* * * * I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment; *which manner of payment makes it impossible to state definitely what amount can be paid to you each year.*"

*You will still have as large a reservation as Pine Ridge after this is cut off.* White men going into that country will build houses and make improvements and the value of your land will be enhanced."

McLaughlin's 1901 words were correct. They were stated in the context of negotiations for the extinguishment of Indian title. McLaughlin's 1903 words may be construed to mean that, even after the land was opened, the unopened portion of the reservation would be as large as Pine Ridge. Nothing indicates that either McLaughlin or the Indians were focusing on shrinking the boundaries of the reservation. But, assuming, as did the court below, that McLaughlin meant that by consent to the bill opening the lands, the reservation would be reduced in geographical size, McLaughlin was wrong and his erroneous statements cannot convert the statutes into cessions.

## III.

## THE EXPRESS LANGUAGE OF THE THREE ROSEBUD ACTS AFFIRMATIVELY COMPELS REJECTION OF THE THESIS OF TERMINATION OF RESERVATION STATUS.

The substance of all three statutes is the same, as is much of the language. All three, without the consent of the Indians, unilaterally directed that the lands be opened to entry, the United States acting as trustee to sell the land and expend the proceeds for the benefit of the Indians "only as received". In the last section of each of the three statutes, the United States disclaimed any intention of purchasing the land or of finding purchasers, or of assuming any obligation except to act as trustee to dispose of the lands. All three reserve certain benefits and lands for the Indians.



The 1904 Act differs in format from the 1907 and 1910 Acts but not in substance. The preamble of the 1904 Act sets out the six articles of the unratified 1901 agreement followed by the operating language of the statute. The operating language purports to ratify the agreement as unilaterally amended to eliminate Article VI of the 1901 "agreement" calling for consent by a three-fourths majority, and Article II calling for payment of the $1,040,000. As a result of these and other substantive changes (Pet. App. 147-149), the 1904 Act, in legal effect, as well as language, is the same as the 1907 and 1910 Acts. In all three statutes, the land was opened for sale to settlers with the proceeds credited to the Indians only as received. Nothing more.

Nothing in the language of the three statutes provides the "clear" intent necessary to terminate the reservation. Nothing supports termination by implication. However, once the court of appeals assumed that the Tribes had ceded the land through the statutes, the court disregarded all language of the statutes inconsistent with the thesis of termination.

**A. The express language of the last section of each of the three statutes establishes that the United States did not purchase and the Tribe did not sell any land.** This has been discussed. Ratification of the 1904 outright cession negotiated by McLaughlin failed because of the opposition to using public money to pay the Tribe and then donating the land to homesteaders under the public land laws (pp. 7-8, *supra*). Doubtless, to assure the opposition that the land would be opened without cost to the United States, the last section of each of the three Rosebud statutes affirmatively spelled out that except for the school lands, the statutes did not bind the United States "to purchase any portion of the

land * * * or to guarantee to find purchasers" and that the United States was simply acting "as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received * * *." (See pp. 6a, 9a, 13a, *infra*.) Significantly, the court below is silent on this key language that cannot be reconciled with the notion that the Tribe sold and the United States bought.

**B. The express language requiring that the proceeds of sales be credited to the Tribe in the Treasury confirms that neither Indian title nor the reservation was extinguished.** Section 5 of the 1907 and Section 7 of the 1910 Acts directed that the proceeds of sale "be deposited in the Treasury of the United States, *to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation* * * *." Section 3 of the 1904 Act used equivalent language. (See pp. 6a, 8a, 12a *infra*.) If the court below is right and each statute terminated a portion of the reservation, the Indians in the disestablished portion would not share in the benefits of those moneys since they would no longer be "Indians belonging and having tribal rights on the Rosebud Reservation".

The district court thought that Congress intended to leave the Indians in the opened areas outside the reservation, stating: "Clearly, there is no other reasonable explanation for such a provision." (Pet. App. 106.) The conclusion of the court of appeals reaches the same result. Thus to the courts below upon enactment of the statutes, the estimated 500 Indians with at least 452 allotments in the Gregory county portion of the reservation (1904 Act), and the 500 Indians with over 2100 allotments in the Tripp county portion of the reservation (1907 Act), and the many more than 1000 Indians and 1949 allotments in the Mellette county portion of the res-



ervation (1910 Act), were no longer "Indians belonging and having tribal rights on the Rosebud Reservation."[45] According to the courts below, those Indians lived on the terminated areas and no longer were reservation Indians eligible for the benefits then available only to reservation Indians.[46]

The court of appeals is silent on the language that the proceeds belonged to the Tribe, not the United States, yet this feature is the basis of this Court's holdings that, in equity, even where the Indians consent to an explicit cession expressed in the broadest terms of conveyance for the purpose of disposing of their lands to settlers, "the Indians continued, until sales were made, the beneficial

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[45]Precise county statistics are not available since the reservation was not managed according to county lines but divided into seven administrative districts. Some of the districts extended into two counties. (See Map, p. 17a, *infra*.) Based on a 1913 report to the Commissioner of Indian Affairs, (App. 1320-1323) information is available as to district populations and the number of allotments as of that date.

Tripp county contained the Big White River district (1700 allotments) (App. 1321) and a part of Ponca Creek district (905 allotments (App. 1321). The remainder of Ponca Creek district was in Gregory county with 452 allotments, S. Rept. 662, 57th Cong., 1st sess., page 4 (1902), (App. 283).

Mellette county contained two full districts and the better part of a third. As of 1913, the two full districts (Black Pipe and Little White River) were reported to have 1000 Indians and 1949 allotments. The third and largest district (Bull Creek) was reported to have 800 Indians and 1889 allotments. (App. 1322.) Also see Map, p. 17a, *infra*.) None of the 1889 allotments is included in the figure used in the text.

[46]Prior to *Morton v. Ruiz*, 415 U.S. 199, 209-210 (1973), the Bureau of Indian Affairs administered the Federal statutes to grant Federal benefits (medical, hospital, funeral, credit, education, welfare, etc.) only to those Indians living on the reservation,—not even "on or near" the reservation.

owners of all their country ceded in trust. Of this we have no doubt." *United States v. Brindle,* 110 U.S. 688, 693 (1884). Also, *Ash Sheep Co. v. United States,* 252 U.S. 159, 166 (1920); *United States v. Mille Lac Band* 229 U.S. 498, 509 (1913); *Minnesota v. Hitchcock,* 185 U.S. 373, 394-395 (1902); *Restoration to Tribal Ownership of Ceded Colorado Ute Land,* 56 I.D. 330, 337-338 (1938).

The holding below reaches the absurd result that the Indians, for whose benefit the proceeds of sales were to be expended, would be ineligible to enjoy those proceeds because they would be off-reservation Indians.

C. **The language of the three Acts reaffirming treaty benefits denies an intent to extinguish the reservation.** The last proviso of the 1907 and 1910 Acts and Section 1, Article V of the 1904 Act each specifies "That nothing in this act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act."

One of the treaty benefits was the right to a defined reservation fixed in Article 2 of the Treaty of April 29, 1868, *supra,* establishing the Great Sioux Reservation, "for the absolute and undisturbed use and occupation of the Indians * * *." The opening sentence of Section 16 of the 1889 Act reguaranteed to the Sioux "at each of said separate reservations * * * all the title and interest of every name and nature secured" by the Treaty of 1868.[47] Section 19 of the 1889 Act similarly extended

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[47]Section 16, in pertinent part, reads:

> "That the acceptance of this act * * * shall be held to confirm in the Indians * * * at each of said

[Footnote continued]



to the Rosebud Indians all of the provisions of the 1868 Treaty, not in conflict with the 1889 Act and that included the promise of "absolute and undisturbed use and occupation" of the reservation. Section 12 of the 1889 Act specified that none of the unallotted land in each of the separate reservations would be sold except with the consent of the tribe of that reservation. (See p. 5, *supra.*) The court below gave no weight to the benefit provisions securing the reservation and construed the three Rosebud acts to abrogate the treaty right to a reservation.[48]

To be sure, the treaty right to a reservation would be inconsistent with an outright cession by a tribe, or with a statute that expressly terminated the reservation status. But, only by *assuming* that the Rosebud Acts did cede and did terminate, can it be said that the benefit provision is inconsistent with those Acts.

The treaty benefit language precludes the notion that Congress, at one and the same time, renewed treaty promises to maintain the reservation, and altered the reservation boundaries so as to strip the reservation Indians of their Federal and tribal rights. To terminate the reservation status is to read the benefit provisions out

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> separate reservations, respectively, to their separate and exclusive use and benefit, all the title and interest of every name and nature secured therein to the different bands of the Sioux Nation by said treaty of [1868] * * *."

[48]Prior to this Court's decision in *DeCoteau,* the court of appeals ruled that the identical treaty benefit language resecured the right to a reservation preserved by an 1886 agreement that corresponds to the Sioux 1868 Treaty and 1889 Act. *City of New Town, North Dakota v. United States,* 454 F.2d 121, 125 (C.A. 8, 1972).

of the three statutes. A construction that reaches that result signals error.

**D. The language of the three Acts reserving tribal land for Indian purposes affirmatively supports an intent to continue the reservation status.** The 1904 Act (sec. 2) and the 1910 Act (sec. 1) authorized the reservation of tribal land for agency, Indian school and religious purposes. The 1910 Act (secs. 1, 4) also reserved to the Tribe land classified as timberland. These statutory provisions are consistent with leaving the reservation status untouched. On the other hand, if, as held below, there was an outright cession and the reservation status of the ceded land was being wiped out, why continue tribal ownership of timberland and land for agencies, for Indian schools and for missions? Why leave the Tribe with vested interests? That was not done in the outright Sisseton and Wahpeton cession in *DeCoteau*. The Sisseton and Wahpeton Act simply gave outside organizations, not the Tribe, a preferential right to purchase land they occupied for religious and educational purposes. Act of March 3, 1891, c. 543, sec. 26, Art. II, sec. 28, 26 Stat. 1038. The court below ignored the language in the Rosebud statutes reserving lands to the Tribe.

**E. The townsite provisions affirmatively support an intent to continue the reservation status.** The 1904 Act makes no special provision for townsites, probably because it originated as an outright cession. However, both the 1907 and 1910 Acts do make special provision for townsites. The point is that if the lands in fact had been public, there would have been no occasion for special provisions. The public land laws provide for townsites. Act of March 3, 1863, c. 80, sec. 1, 12 Stat. 754, 43 U.S.C. 711-727.



Section 4 of the 1907 Act authorized the Secretary of the Interior to reserve land for townsite purposes with the net proceeds from the sale of townsite lots to be credited to the Tribe. Section 3 of the 1910 Act authorized the Secretary to reserve land for townsite purposes, to set apart and patent to the municipality up to 10 acres in each townsite for school, park and other public purposes, and to pay 20% of the money the Tribe received from the sale of its town lots for the construction of schools, other public buildings and improvements in the towns and to credit the Indians with the balance. The donation of 20% of the Tribe's receipts from the sale of lots to pay for public structures in towns, and the donation of up to 10 acres of tribal land for schools, parks and other purposes, is consistent with retaining the reservation status so that reservation Indians might share in the benefits their money helped create.

Given the rule governing the construction of Indian statutes, the townsite language lends support to preserving the reservation status and is inconsistent with an implication of termination. The court below ignored the language.

**F. The allotment provisions do not support termination by implication and confirm that none of the three Rosebud Acts terminated any part of the Rosebud Reservation.** This Court has made plain that allotment provisions in a statute opening an Indian reservation to settlement are "completely consistent with continued reservation status" and that "[T]he presence of allotment provisions * * * cannot be interpreted to mean that the reservation was to be terminated." *Mattz v. Arnett*, 412 U.S. 481, 497, 504 (1973); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). If the Rosebud statutes had prohibited allotments in the opened areas, or

had provided for moving allottees out of the opened area into the "closed" portion of the reservation, there might be room for the argument that such provisions supported the implication of termination deduced below. But that is not what happened.

**The 1904 Act.** When Inspector McLaughlin came on the reservation in the Spring of of 1901 to negotiate an outright cession for the Gregory county area (p. 7, *supra*), there were 4917 Indians living on the reservation, 4508 allotments had been made pursuant to the 1889 Act, and of those 4508 allotments, 452 were in the Gregory county portion of the reservation. CIA 1901, pp. 371, 372, CIA 1903, p. 318; S. Rept. No. 662, 57th Cong., 1st sess., p. 4 (1902). (App. 283). The 1904 Act contains no allotment provisions, doubtless because it pretended to be a ratification of McLaughlin's 1901 agreement, which, if it had been ratified, would have been an outright cession. Neither does the 1904 Act contain provisions disturbing the allotments, or Indians resident in Gregory county. On the contrary, section 2 of the Act reserved Gregory county land for agency, Indian school and religious purposes, even though no such provision was in the unratified 1901 agreement. (See p. 46, *supra*.)

**The 1907 Act allotment provisions.** The allotment provision in section 2 of the 1907 Act did two things. First, it empowered the Secretary to permit any Indian allotted "within the Rosebud Reservation" to relinquish and select a lieu allotment "anywhere within said reservation" and second, it directed the Secretary to allot 160 acres to each eligible, unallotted child before the land was opened.

The purpose of the first feature was to take care of some 80 Indians who had been allotted poor quality



lands and wished to exchange for better allotments.[49] The purpose of the second feature was to grant allotments to the 600 or 700 children who had not received allotments.[50] Allotments to satisfy both demands could be made anywhere within the reservation, including Tripp county, the land that was being opened.

The Council proceedings show that on December 15, 1906 the Indians presented a paper to Inspector McLaughlin setting out their demands. The demand labelled "1st," requested that no lands be disposed of "until after the unallotted children have received land * * *". (App. 781.) The demand labelled "8th" related to the 80 allotments. (App. 784.)[51] As to the "1st", McLaughlin answered (App. 781):"I can positively promise you that, in case we reach an agreement, it will provide for the allotment of lands to all children born since March 3, 1899, and *they may be allotted in Tripp County and before the lands are opened.*" As to the "8th", the 80-allotment request, McLaughlin answered (App. 784):

> * * * In answer to that I will say there will be no difficulty in that. All beneficiaries of the reservation who have not yet received allotments can be allotted before Tripp County is

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[49]The reference to the 80 Indians appears in the Council minutes for December 14, 1906, (App. 784).

[50]At the Council meeting held January 18, 1907, the Agent stated there were "probably six or seven hundred" persons entitled to allotments. Minutes of Council meeting January 18, 1907, (App. 841).

[51]The court of appeals opinion sets out, word for word, the "8th" demand relating to the 80 allotments (Pet. App. 43, n. 87) but says nothing about the "1st" demand calling for allotments for the children.

> opened to settlement, and they can take them anywhere on the reservation, including Tripp County. There will be a provision in the agreement to that effect.

McLaughlin made crystal clear that the Tripp county land would be available for both the new and the lieu allotments.[52] The statute carried out his promise. Section 2 of the 1907 Act (first proviso)[53] carried out the allotment feature just as McLaughlin explained it to the Indians and just as the Indians understood it.[54] That is how the act was administered and the allotments made. Of the 1,083,680 acres in Tripp county, about 138,000 acres had been allotted at the time McLaughlin was conferring with the Indians, (App. 840). As of June 30,

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[52]At the Council meeting held January 18, 1907, Inspector McLaughlin stated that there were "about 907,000 acres unallotted [in Tripp county] as it now stands. *When the children, and those who desire to change their allotments* are allotted, [meaning the 80 poor allotments] should they select lands in Tripp County, it will reduce the acreage greatly." (App. 840.)

[53]"*Provided*, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment * * * anywhere within said reservation, and he *shall also allot [to each eligible child]* * * who has not heretofore received an allotment:* * *.*"

[54]" 'Indian treaties * * * are to be construed in the sense in which naturally the Indians would understand them.' " *Peoria Tribe of Indians v. United States*, 390 U.S. 468, 472 (1968), quoting from *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

"* * * this Court has often held that treaties with the Indians must be interpreted as they would have understood them,* * *" *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

See (App. 766-868) for pertinent excerpts from the 1906-1907 councils conducted by Inspector McLaughlin respecting the Indians' understanding of the allotment provisions.



1925, 406,081.75 acres in Tripp county were in allotments GAO Rept. p. 1653, (App. 1392A). Since there could be no allotments once the Tripp county land was opened, very substantial acreage must have been allotted prior to March 1, 1909 when the land was opened. (37 L.D. 122.) Obviously, the allotments in Tripp county were not limited to 80 Indians dissatisfied with their allotments.

The district court said nothing about the provision for the 600 or 700 new allotments and confined itself to so much of the allotment language as dealt with relinquishment of the 80 low quality allotments. The district court misread that language to permit relinquishment and removal only to the "diminished portion of the reservation". Based on this combination of errors, the district court concluded that the "clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation." (Pet. App. 93.)

There is no "diminished" language in the 1907 Act. Nevertheless, the court of appeals supported the district court's conclusion. The court of appeals, like the district court, was silent on the provision for 600 or 700 allotments for the children. (See p. 50, n. 53, *supra*.) Nor did the court of appeals make reference to the clear understanding given to the Indians by Inspector McLaughlin that all allotments, new and lieu, could be made in Tripp county. The court limited itself to the relinquishment language for the 80 allottees, which, it explained, did no more than permit prior allottees of poor land to select new allotments in Tripp county. (Pet. App. 42-44.)

No statute, let alone Indian statutes, may be correctly construed without considering all of the language. A provision for fresh allotments in the opened area in Tripp county may not be ignored. Moreover, even if the statute had provided only for the 80 allottees, and had omitted allotments for the 600 or 700 children, the provisions still would be totally inconsistent with the "clear" intent essential to terminate reservation status. The allotment provisions of the 1907 Act, as explained to and understood by the Indians, cannot be reconciled with an intent to terminate the reservation status of Tripp county. If Congress had intended to terminate, it hardly would have authorized hundreds of 160-acre allotments anywhere on the reservation, including Tripp County.

**The 1910 Act allotment provisions.** Section 1 of the 1910 Act authorized the Secretary to open Mellette county "except such portions thereof as have been or may *hereafter* be allotted to Indians." The first proviso of section 1 of the 1910 Act conferred on any Indians with allotments "on the tract to be ceded" (Mellette county) the option of relinquishing and receiving lieu allotments "on the diminished reservation". The first proviso of section 2 of the 1910 Act provided that before the Mellette county lands were proclaimed open "the allotments [in Mellete county] shall have been completed."

This language undisputedly authorized new allotments in Mellette county before it was opened to settlers.[55]

[55]The Senate committee report confirms that new allotments could be made "to those so desiring allotments within the area described in section 1 of this bill [Mellette county]", S. Rept. No. 68, 61st Cong., 2d sess., p. 2 (1910), (App. 1238). This was the administrative view. The Bureau of Indian Affairs construed the language to mean that the 1910 Act ' provides for allotments in the opened territory to every man, woman, and child who has not heretofore received an allotment;* * *." (App. 1284.)



Whether the phrase "diminished reservation", used in the lieu allotment provision, included or excluded Mellette county is less certain.[56] From a common sense viewpoint, there is no apparent reason why Congress would explicitly authorize new allotments in Mellette county and at the same time forbid an allottee resident in Mellette county from selecting another allotment in the county of his residence.

As in the case of the 1907 Act, both courts below totally ignored the provision authorizing new allotments in Mellette county and confined themselves to the word "diminished" in the lieu allotment provision. The district court construed the lieu allotment provision to give the Mellette county allottees a move or lose option. Either surrender their allotments and take new allotments on what was left of the court's concept of the reservation, or stay in Mellette county and give up the benefits and privileges of a reservation Indian. To the district court, the "diminished" feature was "the strongest indication yet that the area in question was no longer to be considered 'Indian land'. Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation. They need not retain their allotment in what was no longer to be

[56]The Senate committee report recites that the Secretary "may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished." S. Rept. No. 68, 61st Cong., 2d sess., p. 3 (1910), (App. 1238-1239). The phrase "proposed to be diminished" could include Mellette county since the reservation "proposed" to be diminished would include Mellette county.

considered a reservation. *Clearly, there is no other reasonable explanation for such a provision.*" (Pet. App. 106.)

The court of appeals agreed. (Pet. App. 53-55.)

About the time of the Act of May 30, 1910, there were well over 1000 Indians and more than 1949 allotments in Mellette county. *Indian Population in United States and Alaska* 1910, (GPO 1915).(See p. 43, n.45, *supra.*) The President opened the land for settlement sixteen months later, on October 2, 1911 (40 L.D. 164). According to the courts below, Congress authorized fresh allotments in Mellette county, and at the same time terminated that portion of the reservation. According to the courts below Congress authorized new allotments in Mellette county and at the same time told well over 1000 resident Indians that if they wanted to remain reservation Indians and receive the benefits of Government programs, they had 16 months in which to relinquish their homes in Mellete county, surrender their improvements to the land, uproot their families and community ties, and remove themselves and their belongings to whatever allotments could be found in the picked-over remainder of what constituted the lower courts' 1910 version of the "reservation"–i.e., Todd county.

The rules governing the construction of Indian statutes preclude the move or lose interpretation. First, *all*, not *some*, of the allotment language must be considered. Second, "diminished" may include Mellette County (p. 53, *supra*). Third, proper construction requires that the phrase "diminished reservation", as used in the 1910 Act, be delegated its place in the total context. Before this Court's decision in *DeCoteau*, the court of appeals rejected the contention that the expression "diminished reservation", and the stronger expression "restored to the



public domain", were proof of the Congressional intent to dissolve the Cheyenne River reservation under the Act of May 29, 1908, c. 218, 35 Stat. 460 (p. 14a, Item 15, *infra*). *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-688 (C.A. 8, 1973). There is no reason here to discuss the phrase "restored to public domain" because it does not appear in any of the Rosebud statutes. As to "diminished", in *Condon*, the court of appeals pointed out that the reservation may be "diminished in land size * * * without changing the reservation's boundaries" (*idem*, p. 688). In this case, the court below makes no reference to *Condon* with respect to its construction of the phrase "diminished reservation".

"Diminished" also may have been used as a shorthand term of identification. Compare *Mattz v. Arnett*, 412 U.S. 481 (1973). There the statute directed that all of the surplus lands embraced in "what *was* the Klamath River Reservation" be opened under the public land laws. The Court stated (pp. 498-499) that the reference to the reservation in the past tense "is not to be read as a clear indication of congressional purpose to terminate. * * *The reference * * * in the past tense seems, then, merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act. We do not believe the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo."

The allotment provisions cannot be reconciled with a "clear" intent to terminate. On the other hand, it is perfectly consistent to open reservation land to settlement after first providing for allotments in the opened area. This comports with one of the justifications for opening the land–to afford the Indian the opportunity to learn from his nonIndian brother. *Seymour v. Superin-*

*tendent*, 368 U.S. 351, 356 (1962); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). See H. Rept. 443, 58th Cong., 2d sess., p. 3 (1904); 45 Cong. Rec. 5457 (April 27, 1910), (App. 1111).

**G. The school land grant provisions of the three statutes affirmatively confirm that Congress did not terminate any part of the reservation.** South Dakota, North Dakota, Montana and Washington, all came into the Union under the same Enabling Act of February 22, 1889, c. 180, 25 Stat. 676. Section 10 of that Act granted to each state, upon admission, school sections 16 and 36 in each township in the proposed state, or lands in lieu thereof. The grant expressly excluded "any lands embraced in Indian, * * * reservations * * * until the reservation shall have been extinguished and such lands be restored to, and become part of, the public domain." (Pet. App. 28-29.) Each of the three Rosebud statutes reserved the school sections from entry and granted them, or land in lieu thereof, to the State with the preferential right to select before the land was opened to entry.[57]

The Tribe's position is that if the school grant language had been omitted from the three Rosebud Acts, the State would not have received the school lands. The grant in Section 10 of the Enabling Act did not extend to Indian land for the reason that none of the three Rosebud statutes extinguished the reservation and placed the lands in the public domain. *Minnesota v. Hitchcock*, 185 U.S. 373, 391-392 (1902).

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[57] 1904 Act—sec. 4; 1907 Act—sec. 6; 1910 Act—sec. 8, (pp. 6a, 9a, 13a, *infra*). In each instance the lieu lands were to be selected within the area opened.



The court of appeals discussed the school grant provisions in connection with the 1904 Act (Pet. App. 28-31) and extended those views to the 1907 and 1910 Acts (Pet. App. 38, 53). The court of appeals concluded that Congress placed the school grant in the 1904 Act "to implement the grant in the enabling act and for no other reason" and that the Congressional action "was premised solely upon an understanding that the reservation would be extinguished * * *." (Pet. App. 31.) The court traced the grant to the debates on an amendment to a Senate bill to ratify the 1901 agreement to cede the Gregory county land for a sum certain. (Pet. App. 29.) The amendment would have granted the school sections to the State. (The full text of the amendment is the same as Section 4 of the 1904 Act, p. 6a, *infra*; see pp. 7-8, *supra*.)

During the 1902 debate, Senator Gamble, the sponsor of the bill, correctly explained that the amendment was necessary because under the Enabling Act, Indian lands did not fall within the scope of the grant until "Indian title was extinguished and the lands restored to and became part of the public domain." (Pet. App. 29.) If the 1902 ratification bill had become law without the amendment, the land would not have been subject to the general school grant.[58]

The court of appeals also quoted from the House debate in 1904 on the school grant language in the bill that became the Act of 1904. (Pet. App. 30.) Congressman Burke of South Dakota gave much the same explanation as Senator Gamble did in 1902—i.e., that under the Enabling Act, the State was entitled to the school lands. But unlike the 1902 explanation, the 1904 explanation was erroneous.

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[58] "[Congress] * * * could have by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant." *Minnesota v. Hitchcock*, 185 U.S. 373, 394 (1902).

The 1902 debate was on a bill to ratify an outright cession for a sum certain. The 1904 debate was on the bill that became the 1904 Act. (See pp. 10-11, *supra.*) Since the 1904 Act was not a cession and did not extinguish the Indian title or the reservation, the land opened was not subject to the school grant in the Enabling Act. *Minnesota v. Hitchcock,* 185 U.S. 373, 391-392 (1902). For that reason, if the State was to receive the school lands, it was essential to insert the special school land grant into the 1904 Act.

The court of appeals' reasoning is difficult to follow. If, as the court holds, the three Rosebud statutes extinguished the reservation, there was no reason for the school land language,–the opened lands would have fallen within the grant set out in the Enabling Act. The court avoided this view. If the Tribe is right and the three Rosebud statutes did not extinguish the reservation, the school grant language was necessary in order to donate the lands to the State. The court below had no answer to the Tribe's view. The court seems to have rested its conclusion, not on what Congress *did* in the law itself, but on what the court thought Congress understood from what was said during the debates. (Pet. App. 31.) But in the imperfect process of seeking out the Congressional intent, there is no better evidence than the text of the statute itself. The language of the statute and the legal effect of that language, control. A reservation may be terminated by what Congress *does*, not by what the court believes some members of Congress may have understood. The erroneous delivery or understanding of facts or law, by members of Congress, or even a committee of Congress, does not alter the meaning of the statute itself. *Chippewa Indians v. United States,* 301 U.S. 358, 374-375 (1937). See also, *United States v. O'Brien,* 391 U.S. 367, 384 (1967).



**H. The liquor law provisions of the 1910 Act affirmatively confirm that Congress did not terminate the reservation status.** Section 10 of the 1910 Act extended for 25 years–the term of the trust patents issued to allottees–,the Federal Indian liquor laws, prohibiting the introduction of intoxicants into Indian country, to all land, Indian and nonIndian, trust and fee, in the area to be opened (Mellette county).[59] If Section 10 had been omitted, only land held in trust would have been subject to the proscription against the introduction of intoxicants into Indian country. Liquor could have been introduced on the school lands, on fee lands, whether in the towns, or on the lands taken up by the settlers, and up to 1916, could have been sold to Indian allottees on such lands.

This is so because in 1910 it was a crime to sell liquor to an Indian ward, or allottee, anywhere in the United States, and it was a crime to introduce intoxicants into "Indian country". Act of July 23, 1892, c. 234, 27 Stat. 260, (Pet. App. 55, n. 126). Prior to the 1948 statutory definition of "Indian country" (18 U.S.C. 1151), and at the time of the 1910 Act, the case law limited "Indian country", as used in the Federal Indian liquor laws, to trust land, i.e., land to which the Indian title had not been extinguished. *Clairmont v. United States,* 225 U.S. 551, 557-559 (1912); *Dick v. United States,* 208 U.S. 340,

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[59] The full text of Section 10 reads:

> "That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country."

359 (1908); *United States v Le Bris,* 121 U.S. 278, (1887); *Bates v. Clark,* 95 U.S. 204, 207-208 (1877); including trust allotments, *United States v. Pelican,* 232 U.S. 442, 449-450 (1914); *United States ex rel. Condon v. Erickson,* 478 F.2d 684, 688 (C.A. 8, 1973). In addition, under a decision in effect from 1905 until 1916, upon receiving a trust allotment, an Indian became a citizen free of the Indian liquor laws. *Matter of Heff,* 197 U.S. 448 (1905), ignored in *Hallowell v. United States,* 211 U.S. 317 (1911) and expressly overruled by *United States v. Nice,* 241 U.S. 591 (1916); Cohen, Felix S., *Handbook of Federal Indian Law,* p. 157 (GPO 1945).

This meant that in 1910, under *Matter of Heff, supra,* it was lawful to sell liquor to an Indian allottee, but not to an unallotted Indian, anywhere in the United States where it was otherwise lawful to introduce liquor. In addition, in 1910, under the Federal liquor laws, it was lawful to introduce intoxicants onto nontrust land ~~on i.e., trust land,~~ on or off the reservation, but it was unlawful to introduce intoxicants ~~and~~ INTO nontrust land on the reservation. *Dick v. United States, supra,* p. 359. If Section 10 had not been included in the 1910 Act, liquor could have been lawfully introduced on nontrust land, and up to 1916, when *Heff* was overruled, could have been lawfully sold to nonIndians and Indian allottees on nontrust land on the reservation. Section 10 conferred the same protection that existed before the 1910 Act was enacted. Section 10 made Mellette County "dry" for everyone, Indian or nonIndian, whether on trust or fee land, for the 25-year period of the trust patent, regardless of *Matter of Heff, supra.* Section 10 enlarged, rather than diminished, the protection attaching to Indians on the Mellette County portion of the reservation. The liquor prohibition reflects continued Federal interest.



Even in the case of an outright cession and termination of a reservation, Congress sometimes included the liquor provision simply to protect both the Indian and non-Indian population on the ceded area, as in *Dick v. United States,* 208 U.S. 340 (1908). See *United States v. Mazurie,* 419 U.S. 544, 554 (1975). The court of appeals having assumed that the 1910 Act was a cession, read the liquor language to be nothing more than a *Dick* exercise of the Congressional power to control intoxicants on ceded land. (Pet. App. 55-59.) The court deemed "highly significant" (Pet. App. 58) statements made during the House debate by members, other than the manager or sponsors of the bill, reflecting a wholly erroneous understanding of the law and of the effect of the bill. For example: "* * * when the lands are sold there is no longer a reservation,* * *." (Pet. App. 57.) "It is proposed now to make a sale of it to somebody [referring to settlers]" (*idem,* p. 58). "But if the lands are allotted it is no longer an Indian reservation"; "If the lands are allotted it will be no longer an Indian reservation. If the lands are sold it will be no longer an Indian reservation." (*Idem,* p. 58.) All these statements are contrary to law.

Here again, the court of appeals cast aside the language of the statute and its meaning under the law. The court interpreted the statute on the basis of the "understanding", conveyed by the erroneous statements made during the general debate. The understanding of those members, not the correct law and the legal effect of the statute, controlled the court of appeals' conclusion that the liquor provision—

> "* * * is the continuation of the policy, heretofore adopted and implemented, of reducing the size of the Rosebud reservation in order to make a portion of its lands available to the new settlers.

Again, the congressional motivations are clear, as is its intent." (Pet. App. 59.)

The court of appeals erred in its use of the liquor provision. First of all, resort may be had to statements made during debate, by members, other than those in charge of or sponsoring the bill, only "to show common agreement on purpose as distinguished from interpretation of particular phraseology * * *." *Wright v. Mountain Trust Bank*, 300 U.S. 440, 463, n. 8 (1937). Second, the statute itself is the prime source of Congressional intent. In interpreting the meaning or the legal effect of a statute, the courts may not rely on the erroneous statements, concepts, or understandings of law or fact, even when expressed in a considered written committee report, let alone off-the-cuff observations on the floor of the House. *Chippewa Indians v. United States*, 301 U.S. 358, 374-375 (1937); *United States v. O'Brien*, 391 U.S. 367, 384 (1967).

Apart from all else, assuming that the liquor provision offers a choice between an interpretation that results in continuance of reservation status and one that calls for termination, the rules of construction governing Indian statutes, dictate that all doubts be resolved in favor of retaining the reservation status. (See pp. 26-28, *supra*.) The liquor argument underscores the approach of the court below. The court treated the presence of the liquor provision in the 1910 Act as a badge of termination. But the absence of the liquor provision in the 1904 and 1907 Acts did not influence the court below towards non-termination.



## IV.

## SUBSEQUENT LEGISLATION DOES NOT SUPPORT TERMINATION.

To support the conclusion of termination by the 1907 Act, the court of appeals considered a 1911 and a 1915 statute, both using the phrase "formerly a part of the Rosebud Indian Reservation", or equivalent, to be "[S]ubsequent enactments * * * [that] provide an authoritative contemporary construction." (Pet. App. 44, n. 88.) To confirm that the 1910 Act was a cession, the court cited a 1919 statute using the same phrase (Pet. App. 59, n. 134.) For a contrary view, the court might have cited more contemporaneous statutes , that granted time extensions to settlers but did not refer to the area as "formerly within the Rosebud Indian Reservation", but as "lands in the Rosebud Indian Reservation", as set out in the title to the 1907 and 1910 Acts. Act of March 26, 1910, c. 129, sec. 2, 36 Stat. 265, extending the time for making payments under the 1907 Act; Act of May 28, 1914, c. 102, sec. 1, 38 Stat. 383, extending the time for making payments under the 1910 Act.

For the 1904 Act, the court below did not, but might have, cited the Act of March 3, 1909, c. 263, 35 Stat. 781, 809-810 authorizing the Secretary to issue a fee patent "for the land set apart to the Catholic Church on the Rosebud * * * Reservation,* * * as follows: * * * at or near Ponca Creek [describing land in Section 7, Township 96 North, Range 71 West, of the 5th P.M.]", opened by the 1904 Act.

By the Act of August 20, 1964, 78 Stat. 560, Congress transferred to the Tribe "All the right, title, and interest in and to the following described tracts of land * * * on

the Rosebud Sioux Reservation in South Dakota * * * [describing land in T. 42 N., R. 33 W., in Mellette county]."

By the Act of October 17, 1975, 89 Stat. 577, Congress transferred title to certain "submarginal lands" to 17 tribes, including Rosebud, and specified that the land transferred in trust "shall be a part of the reservations heretofore established for each of the said tribes." S. Rept. 94-377, 94th Cong., 1st Sess., pp. 1, 3 (1975); 121 Cong. Rec. S 16279-80 (September 19, 1975); H. Rept. 94-480, 94th Cong., 1st sess. (1975); 121 Cong. Rec. H9635-9 (October 6, 1975); 121 Cong. Rec. S17685 (October 7, 1975). Part of the 28,734.59 acres transferred to Rosebud is located in Mellette county, deemed "a part of the reservation".

Viewed as a whole, subsequent statutes are not reliable indicators of the Congressional intent expressed in an earlier statute, *Mattz v. Arnett*, 412 U.S. 481, 505, n. 25 (1973). And pre-*DeCoteau*, that was the view below. *City of New Town, North Dakota v. United States*, 454 F.2d 121, 125 (1972). None of the subsequent statutes cited by the court of appeals, or for that matter cited by the Tribe, contains language deliberately chosen to express a Congressional intent one way or the other with respect to the termination of any part of the Rosebud Reservation. Congress was not focusing on the issue in those statutes.



## V.

### CONGRESS AND THE DEPARTMENT OF THE INTERIOR HAVE CONSISTENTLY TREATED AND ADMINISTERED THE OPENED AREAS AS PART OF THE ROSEBUD RESERVATION.

**A. Congress has consistently appropriated for the entire reservation.** Ever since the 1889 Act, and continuing at present, Congress has appropriated funds to maintain an agency on the reservation with Federal employees to administer to the health, welfare and safety of Indians on the reservation, and to protect and manage trust property on the reservation. The United States has provided for schools, hospitals, clinics, medical services, social services, housing, the administration of justice, courts, jails, police, fire suppression, road construction and maintenance, credit, management of realty and other services. (See letter dated August 23, 1974 from the Acting Area Director, Bureau of Indian Affairs, Aberdeen, to Neil Proto, Esquire, Department of Justice.) (App. 1405-1408.)

**B. The opened areas were administered as part of the reservation.** Before and after the enactment of the three Rosebud statutes, the reservation was divided into seven "Farmer" districts each administered by a Federal officer termed "Farmer". CIA 1904, p. 371; CIA 1904, p. 334, (App. 523, 529). The seven districts are outlined on the map at page 17a, *infra*.

Within the seven "Farmer" districts, both before and after the three Rosebud statutes, there were at least 21 day schools, three boarding schools, eight issue stations and the Agency headquarters. (App. 523.) Issue stations and day schools were located in each district. The Farmer's headquarters for each district generally were located at the issue station where the Indians received their rations, supplies and instructions from the Farmer. (App. 523, 1320-1321.)

Reservation-wide reports, made shortly after the third Rosebud statute, leave no doubt but that all the opened areas had been and continued to be administered without interruption as part of the reservation. The Bureau of Indian Affairs made no distinction among Indians who resided on the reservation as defined by the 1889 Act. Such an Indian was a reservation Indian, whether or not he lived on an area opened by one of the three statutes. As of 1913, the table following shows by district, the location, Indian population, day schools and number of

| DISTRICT* | LOCATION | DAY SCHOOLS | Population** | Allotments** | Appendix |
|---|---|---|---|---|---|
| 1. Agency | All in Todd Co. | 2 | 1200 | Not Shown | 1322 |
| 2. Cut Meat | All in Todd Co. | 4 | 1000 | 1332 | 1322 |
| 3. Black Pipe | All in Mellette Co. | 4 | 500 | 981 | 1322 |
| 4. Little White River | All in Mellette Co. | 4 | 500 | 968 | 1322 |
| 5. Butte Creek | Todd & Mellette | 4 | 800 | 1889 | 1322 |
| 6. Big White River | Tripp, Lyman, Gregory | 2 (Tripp) | 500 | 1700 | 1321 |
| 7. Ponca | Tripp & Gregory | 1 (Gregory) | 500 | 905 | 1321 |
| | TOTALS: | 21 | 5000 | 5775*** | |

* The names, locations of the districts and day schools are shown on the map (p. 17a, *infra*). The day schools are listed in the Superintendent's report of September 18, 1913, (App. 1324).

** The number of allotments and the populations are set out in the Superintendent's report of April 26, 1913, (App. 1320-1323).

*** Does not include the allotments in the Agency district.

Contemporaneous with, and after the three Rosebud statutes were enacted, all seven districts were administered as part of the reservation. The "Farmer", equivalent of an assistant superintendent, resided in each district, schools and teachers were maintained in each district, the issue station was operated in each district. The evidence shows continued construction and maintenance of the Government buildings. Communications among the Federal administrative officers, and between the Indians and those officers, referred to areas in the opened counties as part of the reservation. (App. 1409-1412) for a collection of excerpts from materials covering the period 1907-1921.)



**C. The construction and administration of the Indian Reorganization Act of June 18, 1934, confirms that the Department of the Interior did not regard any part of the Rosebud Reservation as terminated.** During the decades 1910-1930, there was no significant general or special legislation touching the problem before the Court. *Federal Indian Law*, pp. 121-127 (GPO 1958). The next decade was notable for the enactment of the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq* (IRA). That Act "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. * * * tribes were encouraged to revitalize their self-government * * * with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

**1. Section 19 of the Indian Reorganization Act (25 U.S.C. 479).** This section defined "Indian" to include members of any recognized tribe and the descendants of such members "residing within the present boundaries of any Indian reservation * * *." Rosebud accepted the provisions of the Act in 1935. (App. 1396.) Ever since 1889, the Department of the Interior and the Indian Health Service have consistently administered the reservation as embracing the opened areas. The three Rosebud statutes were not administratively construed to shrink the bounds of the reservation. No Indian who resided on the Rosebud Reservation as defined by the 1889 Act, has been excluded from Federal benefits, privileges and services as an off-reservation Indian. (See p. 66, *supra*.) The decision below rejects the consistent administrative construction.

**2. Sections 2 and 8 of the Indian Reorganization Act (25 U.S.C. 462, 468.)** These two sections, read together, extend the period of trust on allotments until otherwise directed by Congress, except for allotments "upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." The Department of the Interior has construed these sections to extend the trust on all allotments on the Reservation as defined in 1889 Act. Executive Orders of October 20, 1928, January 16, 1929, March 12, 1930 and December 30, 1931, V Kappler 680, 667, 681 and 642. But, if the decision below is correct, and the opened areas are in the public domain, thousands of allotments in Gregory, Tripp and Mellette counties are outside the boundaries of the Rosebud Reservation and the trust on those allotments has long expired.

This single consequence would be calamitous. Stripped of trust status, Indians could expect their land to be charged with accrued taxes and lost. Allottees would learn how empty the promise the United States wrote into the patents, to transfer the fee "free of all charges or incumbrance whatsoever". *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). The revolutionary results flowing from the judicial termination below would be " 'at the least, a sorry breach of faith with these Indians' ". ( *Idem*, p. 10.)[60]

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[60]The proponents of the South Dakota drive to wipe out the Indian reservations, operating under the euphemism of "Civil Liberties for South Dakota Citizens", would have accomplished their prime objective—to move Indian trust land out of Federal

[Footnote continued]



To reach the conclusion that thousands of allotments lost their trust status, the Court below *sub silentio* overruled its own holding in *Putnam v. United States*, 248 F.2d 292 (C.A. 8, 1957). In that case, the court construed the Pine Ridge 1910 Act, which became law three days before the Rosebud 1910 Act. The two statutes are "substantially identical". *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (C.A. 8, 1975) pending on petition for a writ of certiorari, No. 75-5867, filed December 8, 1975. In *Putnam*, the court below held that the trust period had not expired on an allotment in Bennett County, opened by the Pine Ridge statute, because the allotment was within the Pine Ridge Reservation as delimited in the same 1889 Act defining the Rosebud Reservation. The court stated (p. 295):

> "* * * These allotted lands must be deemed to be among those which were not restored to the 'public domain', having been specifically excepted in the Act of May 17, 1910, from the portion of the Reservation which was open to settlement."

In its recent decision in *Parkinson, supra*, the court below construed the same 1910 Act that was before it in

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protection. There are six surplus land acts affecting Standing Rock, Cheyenne River, Rosebud and Pine Ridge reservations in South Dakota (p. 14a, Items 2,13, 15, 18, 19, 21, *infra*). All six are under attack. In this case, the court of appeals has judicially terminated three-fourths of the Rosebud Reservation (Items 2, 13, 19) and in *Parkinson*, the court wiped out a major part of the Pine Ridge Reservation (Item 18). The Federal district court in South Dakota recently held that the 1913 Act terminated the eastern one-half of the Standing Rock Reservation (Item 21). *United States v. Long Elk* and related cases now pending on appeal in the court below (Nos. 76-1385 through 1391). The Supreme Court of South Dakota has before it an appeal challenging the sixth statute (1908 Act) as to which the Federal district court in *Long Elk* expressed a strong dictum that the 1908 Act extinguished reservation status.

*Putnam*. Mainly on authority of its holding in *Rosebud* (*idem*, p. 123), the court held that "Bennett County, South Dakota, was severed from the Pine Ridge Indian Reservation by the Act of May 27, 1910 and became part of the public domain and the State of South Dakota." (*Idem*, p. 124.) No mention is made of *Putnam*. In short, the decision below places in jeopardy the trust status of tens of thousands of allotments on the reservations affected by surplus land statutes.

**3. Section 3 of the Indian Reorganization Act of 1934 (25 U.S.C. 463).** Section 3 authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal * * *." Acting under that authority, the Secretary explicitly listed for withdrawal from disposal, and for restoration to the Tribe, the undisposed of land on the Rosebud Reservation opened by the 1904, 1907 and 1910 Acts. The Secretary identified Rosebud as one of the "reservations where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of." (54 I.D. 559, 561, 562 (1934)). That decision exemplifies the administrative view that the reservation was not dissolved. *Seymour v. Superintendent*, 368 U.S. 351, 357 (1962).

**D. The Secretary of the Interior approved the Tribal Constitution defining the reservation as delimited in the 1889 Act.** Rosebud was among the first tribes to adopt a Constitution under the Indian Reorganization Act. Constitution approved December 20, 1935, (App. 1396). Article I of the tribal Constitution defines the jurisdiction of the Tribe as extending "to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889,* * *."



(App. 1394.) The Secretary of the Interior approved the Constitution. The territorial scope of the Tribe's sovereignty over Indians has never been in doubt.

The 1935 Constitution divided the entire reservation as defined in the 1889 Act, into election districts designated "communities". (App. 1394.) The Indians in each district elect councilmen to the Tribal Council, the governing body of the Tribe, including councilmen from Gregory, Tripp and Mellette counties. The Council consistently has regarded the entire area as part of the reservation.

**E. The Field Solicitor for the Department of the Interior considered that no part of the reservation was disestablished.** By memorandum dated April 6, 1972, the Field Solicitor for the Department of the Interior at Aberdeen, South Dakota, expressed the opinion that none of the three Rosebud Acts disestablished any part of the Rosebud Reservation. (App. 1403-1404.) The opinion rests primarily on an analysis of the language of the three statutes, underscoring the absence of language of termination and language placing the land in the public domain, and on authority of a comprehensive opinion of the Solicitor construing the Fort Berthold 1910 Act that became law two days after the Rosebud 1910 Act (p. 14a, Items 19, 20, *infra*). Both acts are virtually identical. The Solicitor ruled that the Fort Berthold Act did not terminate the reservation status. *Boundaries of the Fort Berthold Indian Reservation in North Dakota*, M-36802, (March 13, 1970 (unpublished).

## CONCLUSION

The policy of the United States towards Indian tribes has not been static From decade to decade, different policymakers have mposed their cure for what they considered to be the problem, ranging from assimilation to relocation off the reservation and from termination of the Federal relationship to the current recognition that the reservation is home, with the "focus upon strengthening tribal self-government * * *." *Bryan v. Itasca County, Minnesota,* ____U.S. ____, No. 75-5027, slip op. p. 15 n. 14, June 15, 1976; *Federal Indian Law,* pp. 115-136 (GPO 1958); *A History of Indian Policy,* S. Lyman Tyler, pp. 151-186 (GPO 1973). Through it all, the reservation retained its status. The ongoing special relationship between the United States and Indian tribes was never disturbed unless Congress acted affirmatively to dissolve it, as in the case of the Klamath, the Menominees and others listed in *Bryan v. Itasca County, Minnesota, supra,* n. 15.

The judgment of the court of appeals should be reversed with directions to enter a judgment declaring that no part of the Rosebud Reservation, as delimited in the 1889 Act, has been terminated or extinguished.

Respectfully submitted,

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
*Attorney for the Petitioner.*

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# APPENDIX

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## [Act of April 23, 1904, c. 1484, 33 Stat. 254, 3 Kappler 71]

[71] CHAP. 1484.—An act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.

Whereas James McLaughlin, United States Indian inspector, did, on the fourteenth day of September, anno Domini nineteen hundred and one, make and conclude an agreement with the male adult Indians of the Rosebud Reservation, in the State of South Dakota, which said agreement is in words and figures as follows:

This agreement made and entered into on the fourteenth day of September, nineteen hundred and one, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Sioux tribe of Indians belonging on the Rosebud Reservation, in the State of South Dakota, witnesseth:

ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand (416,000) acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.

[72] ARTICLE III. It is agreed that of the amount to be expended for and paid to said Indians, as stipulated in Article II of this agreement, the sum of two hundred and fifty thousand (250,000) dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as

possible among men, women, and children as soon as practicable after the ratification of this agreement, and that the sum of seven hundred and ninety thousand (790,000) dollars shall be paid to said Indians per capita in cash in five annual installments of one hundred and fifty-eight thousand (158,000) dollars each, the first of which cash payments shall be made within four months after the ratification of this agreement.

ARTICLE IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

ARTICLE V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE VI. This agreement shall take effect and be in force when signed by U. S. Indian Inspector James McLaughlin and by three-fourths of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U. S. Indian inspector, on the part of the United States, and the male adult Indians belonging on the Rosebud Reservation, South Dakota, have hereunto set their hands and seals at Rosebud Indian Agency, South Dakota, this fourteenth day of September, A. D. nineteen hundred and one.

JAMES MCLAUGHLIN,
U. S. Indian Inspector.

| No. | Name. | Mark. | Age. |
|---|---|---|---|
| 1 | He Dog | x | 65 |
| 2 | High Hawk | x | 50 |
| 3 | Black Bird | x | 62 |
| | and 1,028 more Indian signatures. | | |

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open council to the Indians of the Rosebud Agency, South Dakota; that it was fully understood by them before signing, and that the foregoing signatures, though names are



similar in some cases, represent different individuals in each instance, as indicated by their respective ages.

WILLIAM BORDEAUX, Official Interpreter.
WM. F. SCHMIDT, Special Interpreter.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

[73] We, the undersigned, do hereby certify that we witnessed the signatures of James McLaughlin, United States Indian inspector, and the 1,031 Indians of the Rosebud Agency, S. Dak., to the foregoing agreement.

FRANK MULLEN, Agency Clerk.
C. H. BENNETT, Farmer, Cut Meat District.
JOHN SULLIVAN, Farmer, Black Pipe District.
FRANK ROBINSON, Farmer, Little White River District.
FRANK SYPAL, Farmer, Butte Creek District.
ISAAC BETTELYOUN, Farmer, Big White River District.
JAMES A. MCCORKLE, Farmer, Ponca District.
LOUIS BORDEAUX, Ex-Farmer, Agency District.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

I certify that the total number of male adult Indians over 18 years of age belonging on the Rosebud Reservation, S. Dak., is 1,359, of whom 1,031 have signed the foregoing agreement, being 12 more than three-fourths of the male adult Indians of the Rosebud Reservation, S. Dak.

CHAS. E. MCCHESNEY,
United States Indian Agent.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

Therefore,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended and modified, as follows:

"ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point

of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

"ART. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and town-site laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre.

"ART. III. It is agreed that of the amount to be derived from the sale of said lands to be paid to said Indians, as stipulated in article two of this agreement, the sum of two hundred and fifty thousand dollars
[74] shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children, but not more than one half of the money received in any one year shall be expended as aforesaid, and the other half shall be paid to said Indians per capita in cash, and an accounting, settlement, and payment shall be made in the month of October in each year until the lands are fully paid for and the funds distributed in accordance with this agreement: *Provided, however,* That not more than five hundred thousand dollars shall be expended or paid within two years after the ratification of this agreement, and not to exceed one hundred and fifty thousand dollars in each of the following years until the expiration of five years.

"ART. IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

"ART. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

SEC. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed



of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years
[75] after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry: *Provided,* That in case any entryman fails to make such payment or any of them within the time stated all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be cancelled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: *And provided further,* That all lands herein ceded and opened to settlement under this act, remaining undisposed of at the expiration of four years from the taking effect of this act, shall be sold and disposed of

for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.[1]

SEC. 3. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and paid to the Rosebud Indians or expended on their account only as provided in article three of said agreement as herein amended.

SEC. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said county of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section four of this act.

SEC. 6. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved, April 23, 1904.

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[1] 38 L. D., 213.



## [Act of March 2, 1907, c. 2536, 34 Stat. 1230, 3 Kappler 307]

[307] CHAP. 2536.—An act to authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

SEC. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux Tribe of Indians belonging on the Rosebud Reservation who is living at the time of the passage and approval of this act and who has not heretofore received an allotment:[1] *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged.[2]

SEC. 3. That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and fifty cents per acre; after the expiration of six months after the

same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the same price that it was first entered:[3] *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments pre-
[308] viously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

SEC. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

SEC. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and dispo-



sition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash, per capita, share and share alike, if in his opinion such payments will be for the best interests of said Indians.

SEC. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and sixty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section six of this act. And there is hereby appropriated the further
[309] sum of fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of making the allotments provided for herein: *Provided*, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Rosebud Indians.

SEC. 8. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided: *Provided*, That nothing in this act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

Approved, March 2, 1907.

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[1] 40 L. D., 6. [2] 40 L. D., 54. [3] 41 L. D., 128, 636.

## [Act of May 30, 1910, c. 260, 36 Stat. 443, 3 Kappler 459]

[459] CHAP. 260.—An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh Counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian Reservations, thence south along the boundary line between said reservations to the township line separating townships thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided*, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: *And provided further*, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: *And provided further*, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be



disposed of as prescribed herein shall have been completed: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and
[460] four and twenty-three hundred and five of the Revised Statutes as amended by the act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians, as hereinafter provided.

SEC. 4. That the price of said lands entered as homesteads under the provisions of this act shall be fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this act. In making such classification and appraisement said lands shall be divided into the following classes: First

agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: *Provided*, That timber lands may be classified without regard to acreage: *And provided further*, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

SEC. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion
[461] of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this act.

SEC. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.



SEC. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

[462] SEC. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

SEC. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

SEC. 11. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

Approved, May 30, 1910.

## Surplus Land Statutes Enacted 1904-1913

| | | Reservation Population* | Enrollment* |
|---|---|---|---|
| 1. Red Lake, Minn. | 2/20/04, c. 161, 33 Stat. 46 | 2,737 | 4,774 |
| 2. Rosebud, S.D. | 4/23/04, c. 1484, 33 Stat. 254 | 7,181 | 9,400 |
| 3, Flathead, Mont. | 4/23/04, c. 1495, 33 Stat. 302 | 2,825 | 5,296 |
| 4. Devils Lake, N.D. | 4/27/04, c. 1620, 33 Stat. 319 | 1,748 | 1,629 |
| 5. Crow, Mont. | 4/27/04, c. 1624, 33 Stat. 352 | 3,842 | 4,828 |
| 6. Grande Ronde, Ore. | 4/28/04, c. 1820, 33 Stat. 567 | ** | ** |
| 7. Yakima, Wash. | 12/21/04, c. 22, 33 Stat. 595 | 7,010 | 5,391 |
| 8. Wind River, Wyo. | 3/3/05, c. 1452, 35 Stat. 458 | 4,062 | 4,594 |
| 9. Colville, Wash. | 3/22/06, c. 1126, 34 Stat 80 | 2,949 | 4,953 |
| | (Held not to terminate reservation status in *Seymour v. Superintendent*, 368 U.S. 351 (1962)) | | |
| 10. Lower Brule, S.D. | 4/21/06, c. 1645, 34 Stat. 124 | 581 | 296 |
| 11. Coeur D'Alene, Idaho | 6/21/06, c. 3504, 34 Stat. 334 | 523 | 523 |
| 12. Blackfeet, Mont. | 3/1/07, c. 2285, 34 Stat. 1035 | 6,220 | 10,467 |
| 13. Rosebud, S.D. | 3/2/07, c. 2536, 34 Stat. 1230 | — | — |
| 14. Spokane, Wash. | 5/29/08, c. 217, 35 Stat. 458 | 600 | 1,500 |
| 15. Cheyenne R., S.D. | 5/29/08, c. 218, 35 Stat. 460 | 4,236 | 5,993 |
| | (Held not to terminate reservation status in *United States ex. rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8, 1973)) | | |
| 16. St. Rock, N.D., S.D. | 5/29/08, c. 218, 35 Stat. 460 | 4,712 | 7,131 |
| 17. Fort Peck, Mont. | 5/30/08, c. 237, 35 Stat. 558 | 6,000 | 5,674 |
| 18. Pine Ridge, S.D. | 5/27/10, c. 257, 36 Stat. 440 | 11,151 | 13,813 |
| 19. Rosebud, S.D. | 5/30/10, c. 260, 36 Stat. 448 | — | — |
| 20. Ft. Berthold, N.D. | 6/1/10, c. 264, 36 Stat. 455 | 2,677 | 3,709 |
| | (Held not to terminate reservation status in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8, 1972)) | | |
| 21. St. Rock, N.D., S.D. | 2/14/13, c. 54, 37 Stat. 675 | — | — |
| | (Held not to terminate reservation status in *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972)) | | |
| | TOTALS: | 69,054 | 89,971 |

* *Federal and State Indian Reservations*, pp. 131, 180, 189, 191, 193, 197-198, 316, 317-318, 330, 335, 337, 339, 343, 359, 387, 393-394, 415-416.

** Terminated. Act of August 13, 1954, c. 733, sec. 2, 68 Stat. 724 (35 U.S.C. 691 *et seq.*)

*** Held to terminate reservation status, *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (C.A. 8, 1975), certiorari granted May 24, 1976, No. 75-562 (44 LW 3661)

**** Held to terminate reservation status in *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (C.A. 8, 1975)



**[Section 12 of the Act of March 2, 1889, c. 405, 25 Stat. 888]**

SEC. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona-fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservation belonged; and the same, with interest thereon at five per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians, or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward, delivered, free of charge, to the allottee entitled thereto.

**[Sections 2 and 8 of the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984 (25 U.S.C. 462, 468)]**

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

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Sec. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

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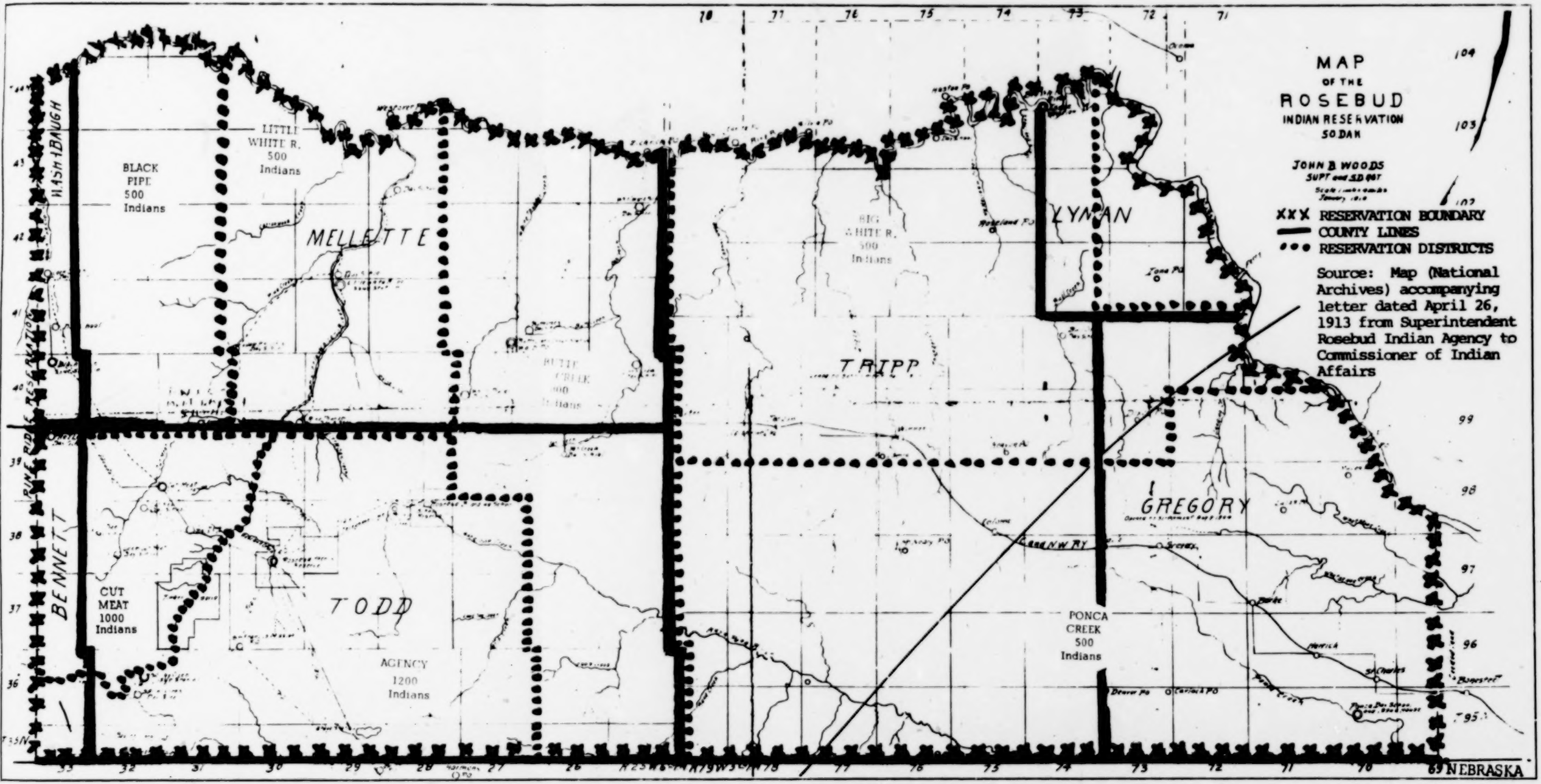
MAP
OF THE
ROSEBUD
INDIAN RESERVATION
SO DAK
JOHN B WOODS
SUPT and S.D. 1907
XXX RESERVATION BOUNDARY
COUNTY LINES
RESERVATION DISTRICTS
Source: Map (National Archives) accompanying letter dated April 26, 1913 from Superintendent Rosebud Indian Agency to Commissioner of Indian Affairs
WASHABAUGH
BLACK PIPE 500 Indians
LITTLE WHITE R. 500 Indians
MELLETTE
BIG WHITE R. 500 Indians
LYMAN
TRIPP
GREGORY
BENNETT
CUT MEAT 1000 Indians
TODD
AGENCY 1200 Indians
PONCA CREEK 500 Indians
NEBRASKA